ISLAMIC JURISPRUDENCE

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PREFACE

This book offers an analytical and comparative study of Islamic jurisprudence. It deals with the principles of Islamic jurisprudence and Muslim law. Efforts have been made to present to the reader a general picture of the growth and evolution of Islamic law. The chief aim of writing this book is to give the philosophy of Islamic law. To this end all the available sources have been used and references have been given from the works of eminent jurists.

The book has two parts. The general purpose of the First Part is to elucidate the principles of Islamic jurisprudence with comparative treatment. The Second Part deals with the procedural law. I have endeavoured to explain the fundamental principles and legal ideas. The doctrines and views discussed are particularly the Hanafite and, to a less extent, of the other sects of Muslims. The source of each view has been hinted at whenever it was deemed necessary.

This book is not intended to be the last word. It claims only to give an impetus to the realisation of certain definite ends. Unnecessary detail and description is altogether discarded. At the same time an attempt has been made that an average student or general reader should be able to follow the Islamic

law. I hope that this book will be of some practical use to those who have a desire to understand the subject.

The citations from the Holy Qur'an are mainly based on the English translation of the Qur'an by Muhammad Marmaduke Pickthall, *The Meaning of the Glorious Qur'an*, Hyderabad Deccan, 1938.

I take this opportunity to express my gratitude to all those who have assisted me in this work, particularly Professor S.M. Anwar, Advocate, and Professor S.F. Hussain Qadri, Advocate, who enriched me with their useful suggestions regarding this book. I feel especially grateful to Professor Hamid Ullah Siddiqi, Ex-Principal of Government H.I. Law College Lahore, for his kind guidance.

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Part I

JURISPRUDENCE

Chapter 1

DEFINITION OF LAW

The literal meaning of the word قانون is "جڑ", "بنیاد", "ہر علم کا اصل", "قاعدہ" or "دستور". The word *Kanun* has Greek origin.[1] It has come into Arabic through the Syriac language (سریانی). This word was used in the sense of مسطرة (foot-rule) and then it got the meaning of rule (قاعدہ). At present this term connotes ecclesiastical laws (قانون کلیسا) in the European languages.

Dr Sobhi Mahmassani writes :

"عربی زبان میں یہ لفظ 'مقیاس کل شیء' 'ہر چیز کے اندازہ کرنے کا آلہ' کے معنوں میں استعمال ہوتا ہے ، اور یہیں سے اس لفظ کے وہ عام معنی پیدا ہوئے کہ یہ لفظ ہر جامع اور ضروری قاعدے کے لیے بولا جانے لگا ۔ چنانچہ قانون صحت اور قوانین فطرت وغیرہ کلمات بولے جاتے ہیں۔"[2]

But the Muslim jurists instead use the terms شرائع اسلام e.g., etc., حکم شرعی and شریعت, شرع means قوانین اسلام.

The term "law" is used in English in two main senses :

(1) as a rule prescribed by authority for human action, and
(2) in scientific and philosophic phraseology, as a uniform order of sequence.[3]

The word "law" is used in various senses. In

1. *Encyclopaedia of Islam*, II, 723.
2. فلسفہ شریعت اسلام, p. 8.
3. *Encyclopaedia Britannica* (XI Ed.), XVI, 299.

the first place it is often applied to the sequence of cause and effect in the world of phenonema, e.g. laws of gravitation and of chemical reaction. Such laws are called physical laws. Secondly, the term "law" is used to designate rules for the guidance of human conduct. If such a law is concerned with motives and internal or subjective acts of the will, it is called moral law. If the laws refer to objective acts, they may be either social laws or political laws. The social laws are enforced by public opinion, and political laws by the State. Professor Holland thus defined law as "a general rule of external human action enforced by a sovereign political authority."[4]

In order to live in a society a man has to impose certain restrictions on him. Only a few persons can impose such restrictions on them. For a healthy society these restrictions are imposed by the State in the form of law. Restrictions bring laws and laws ensure liberty. Else in the language of Allamah Iqbal:

دہر میں عیش دوام آئیں کی پابندی سے ہے
موج کو آزادیاں ساماں شیون ہو گئیں[5]

Law and social life are interlaced. Absence of law means the law of jungle. It reflects social conditions. Moreover, it holds mirror to the community. From the law of community we can judge its character. It also regulates outward conduct. The above joined are the common manifestations of law.

4. *The Elements of Jurisprudence*, p. 42.
5. *Kulliyat-i-Iqbal* (*Urdu*), p. 187.

The main object of law is to keep a complete control over the society. The rights of individuals as well as of society are guaranteed by it. It is the society which gives a special colouring to the system of law. The law changes according to the needs of social life. Every society has its own legal system. Islam, too, has its own legal system which is popularly known as *Fiqh*. Mr Ahmad Hasan says:

"Islamic Law is not purely legal in the strict sense of the term; rather it embraces all the spheres of life—ethical, religious, political and economic. It has its origin in the Divine Revelation. The Revelation determined the norms and basic concepts of Islamic Law and in many respects initiated a break with the history and the tribal legal system of pre-Islamic Arabia."[6]

6. *The Early Development of Islamic Jurisprudence*, p. xiii.

Chapter 2

COMPARISON BETWEEN GOD-MADE AND MAN-MADE LAWS

(1) Man-made laws are defective but God-made laws are perfect. The Qur'an says :

لقد ارسلنا رسلنا بالبينت و انزلنا معهم الكتب والميزان ليقوم الناس بالقسط (57 : 25) -

[We verily sent Our messengers with clear proofs, and revealed with them the Scripture and the Balance, that mankind may observe right measure.]

If God-made laws are not adopted by a man there is a possibility of his adoption of those laws which are the outcome of his basic motives. In spite of all his foresightedness and intelligence man is unable to cover all the universal laws, so the safer course for him is to accept the God-made law *in toto*. The Qur'an says :

و من لم يحكم بما انزل الله فاولئک هم الكافرون (5 : 47) -

[اور جو حکم نہ کریں اس قانون کے مطابق جو ہم نے نازل کیا سو وہی لوگ کافر ہیں -]

[Whoso judgeth not by that which Allah hath revealed, such are disbelievers.]

The anarchy in the world is due to the reason that the people have no equation with the Divine Laws. One of the distinctive features of the Islamic Law is that its fountainhead is Allah, Who is the

Law-giver. The supreme power vests in Him. This idea is clear in the sub-joined verse :

ان الحكم الا لله (12 : 40) -

[Lo! the decision rests with Allah only.]

الا له الخلق والامر (12 : 67) -

[یاد رکھو اس نے کائنات کو پیدا کیا ہے اور قانون بھی اس کا حق ہے -]

(2) God-made laws are comprehensive and all-embracing. They cover the spiritual as well as the temporal aspects of man's life. The other laws are limited to the mutual co-operation of the people. They have no concern with the mutual relationship of man with God. They consider religion as a private affair of man.

(3) Man-made laws have limitation of time and age whereas God-made laws are eternal.

(4) The Divine Law requires no amendment. It is perfect and final. It stands good for all times, climes and people.

(5) God-made laws include devotion (عبادات) and mundane affairs (دنیاوی معاملات) alike. They are distinct from the man-made laws which are concerned only with معاملات. They have no concern with religion. God says :

ثم جعلنک على شريعة من الامر فاتبعها ولا تتبع اهواء الذين لا يعلمون (45 : 18) -

[And now have We set thee (O Muhammad) on a clear road of (Our) commandment ; so follow it and follow not the whims of those who know not.]

(6) Man-made laws are in the process of change

and have no virtue of finality and perfection. They change their shades with the vicissitudes of time and demand.

Iqbal says :

تقدیر کے پابند نباتات و جادات مومن فقط احکام الٰہی کا ہے پابند

(7) The man-made law depends upon either the sanction of a chief of the tribe or some court has acted upon it or some Government has adopted it. On the other hand, Islamic Law does not depend upon such things. It is in fact God-made Law. If any court or State rejects it, it amounts to treason against the Divine Law. The Qur'an says :

و من لم یحکم بما انزل اللہ فاولئک ھم الفاسقون (5 : 50) -

[Whoso judgeth not by that what Allah hath revealed, such are evil-livers.]

(8) Man-made law has no sanctity attached to it, but God-made Law is most respected. Man believes that his salvation in this world and hereafter lies in its obedience.

(9) The real basis of man-made laws is custom and usages (عادت ، عرف ، رواج). The scientific and philosophical tinge is given at the later stage. It comprises short-sightedness and bias of the tribal life. In the eighteenth century efforts were made to add justice, equity and good conscience to it. It follows that there is no cohesion and balance in its past and present. Similarly no one can predict its future. On the other hand Divine Law is based on human nature and Divine guidance since the dawn of this universe. Customs and usages are also applicable if they are

not contrary to the Qur'an and *Sunnah*. There is a complete uniformity in its past, present and future. It is perfect and final code. The Qur'an says :

الیوم اکملت لکم دینکم و اتممت علیکم نعمتی و رضیت لکم الاسلام دینا (5 : 3) -

This is also evident in this Qur'anic verse :

شرع لکم من الدین ما وصیٰ بہ نوحاً والذی اوحینا الیک وما وصینا بہ ابراھیم و موسیٰ و عیسیٰ ان اقیموا الدین ولا تتفرقوا فیہ (42 : 13) -

[اور تمہارے لیے بھی اسی دین کو شروع کیا ہے جس کی تعلیم نوح کو دی اور اے پیغمبر! یہ دین بھی جس کی وحی ہم نے تمہاری طرف کی ہے وہی ہے اور یہی دین ہے جس کی تعلیم ہم نے ابراھیم اور موسیٰ اور عیسیٰ کو دی تھی کہ اس دین کو قائم رکھو اور اس میں اختلاف نہ ڈالو -]

Chapter 3

ISLAMIC SCALE OF LAWS AND THE STOIC PHILOSOPHY

Before dealing with this question it seems proper to explain what is Stoic philosophy. It is evident that the idea of the natural justice originated with the Greek philosophers. According to these philosophers, the principle of uniformity pervaded the universe and this should provide a number of fixed rules of conduct for the guidance of the action of men. These fixed principles were given the name of natural justice and law.

The Stoics considered by it the rule of reason. They developed this concept and defined it as "The manifestation of the single and homogeneous spirit of the world." They believed that the laws of land should be shaped in accordance with this Divine reason which pervades all natural phenomena. This Stoic philosophy had a great influence on the Roman Law. Formerly the Romans had their jus civile or civil law to guide the affairs of the State, but under the influence of the Stoic philosophy, a system of law developed under the name of jus gentium or law of nations in order to deal with foreigners in Rome. Afterwards it was recognised that the jus gentium was really the law of nature so the jus civile

of Rome was replaced by jus natural.

The basic principle of the Muslim Law is to do what is good, and abstain from what is evil, and take care of the intermediary grades of plausible, permissible and disliked. The acts of the human beings may be classified as under : (1) Obligatory (واجب), (2) Recommended (مستحب), (3) Permitted (مباح), (4) Disapproved (مکروہ), (5) Prohibited (حرام). Mr Schacht says that this classification was borrowed from the Stoic philosophy by the Muslim jurists. But his allegation is not correct, because he could not give any evidence for the adoption of this scale. In fact, the codification of the Islamic Law according to this scale was earlier than the Greek philosophy was translated. Moreover, the Muslim jurists were not interested in the Stoic thought.

Islam gave universal charter for every freedom and for every race. It undertakes the security of life and property.

لکل جعلنا منکم شرعة و منهاجا (5 : 48) -

[اور ہم نے تم میں سے ہر ملت کو قانون اور راہ عمل دی -]

Justice is the mainstay of Islamic Law. The Qur'an commands: "When you judge amongst men, judge with justice" (4 : 58) even if it is injurious to one's self interest or to the interest of one's own near relatives. This conception of justice in Islam is superior to distributive and remedial justice of Aristotle ; the natural justice of English, Common Law,

the formal Justice of the Roman Law. It points out the motive of man (بخاری) الاعمال بالنیات.

Though the Stoic philosophers considered the law of nature as of great importance, yet if we judge it carefully it is clear that natural law is not historically true. Man was never guided by it. On the other hand, Islamic Law is a guiding force for all. (2) The law of nature has no legal sanction behind it. (3) The law of nature makes no difference between law as it is prevalent in the society and law as it should be. But Islamic Law makes such distinction. It searches out the inherent defects of the society and provides its possible remedy. (4) As the human nature is imperfect, the human institutions cannot be perfect and so the imaginary law of nature has little applicability for them. In the words of Kant, the laws of nature may serve as a standard of justice. Sir Abdul Rahim says:

> "The Holy Prophet propounded the principles of municipal law as an integral part of a comprehensive scheme of universal religion."[1]

Islamic legislation is a balanced combination of spiritual and material elements. It provides spiritual direction along with legal safeguards. Thus, Islam is not merely a religion in the sense in which this term is understood in the West. It is rather a comprehensive spiritual and material way of life, which expresses itself in the conscience of the individual as

1. *The Principles of Muhammadan Jurisprudence*, p. 16.

well as in the behaviour of the society. It provides principles for social rights and obligations in all dealings whether they pertain to economics, politics or international relations.[2]

2. Dr. Saeed Ramadan, *Islam, Doctrine and Ways of Life*, Vol. I, No. 2.

Chapter 4

DEFINITION OF JURISPRUDENCE

The dictionary meaning of the term فقہ is understanding or knowledge (سمجھ). It is used in the same sense in the Holy Qur'an, e.g. (9 : 87) : و طبع علی قلوبھم فھم لا یفقھون. In *Shari'at* terminology the term فقہ is confined to religious knowledge (علم دین).

The Muslim jurists defined (فقہ) as :

"الفقه علم بالمسائل الشرعية مكتسب من ادلة الاحكام التفصيليه ـ"

[اعمال شرعیہ کے مسائل کا علم فقہ کہلاتا ہے جو احکام تفصیلیہ کے دلائل سے مستنبط ہو ـ]

According to Imam Abu Hanifah, *Fiqh* is a knowledge of what is for a man's self and what is against a man's self (مالہ وما علیہ). The definition is based on the Qur'anic verse :

لھا ما کسبت و علیھا ما اکتبست (2 : 286) ـ

[واسطے اس کے ہے جو کمایا اس نے اور اوپر اس کے ہے جو کمایا اس نے ـ]

It is the science of rights and obligations of man.

Imam Malik defined *Fiqh* as "the science of commands of the *Shari'at*, in particular matters deduced by the application of a process of reasoning."

Imam Shafi'i gives the following definition : "*Fiqh* is the knowledge of the laws of *Shari'at* relating to man's acts and derived from specific sources."

The object of *Fiqh* in the early days of Islam (صدر اسلام) was to get a knowledge of the next world. But Imam Ghazali considers that "it is now confined to the science of the rules of law".

The author of "توضیح" defines *Fiqh* as "the knowledge of laws (احکام) of the *Shari'at* which are intended to be acted upon, and have been divulged to us by revelation or determined by concurrent decisions of the learned, such knowledge being derived from the sources of law with the power of making current deductions therefrom.[1]

"*Shari'at*," says Sir Abdur Rahim, "which may be translated as the Islamic Code, means matters which would not have been known but for the communication made to us by the law-giver."[2]

Fiqh is an important science according to the Qur'an and *Sunnah*. Muslims are persuaded to study it. The Holy Qur'an says :

فلو لا نفر من کل فرقة منھم طائفة لیتفقھوا فی الدین (9 : 122) ـ

[پس کیوں نہ نکلے ہر فرقے سے ان میں سے ایک جماعت تا کہ سمجھ سکیں بیچ دین کے ـ]

In another verse (4 : 78) its importance is manifest :

فال ھولاء القوم لا یکادون یفقھون حدیثا ـ

[تو ان لوگوں کو کیا ہوا کہ بات سمجھنے کے پاس کو بھی نہیں نکلے ـ]

1. "توضیح" (Calcutta Ed.). p. 14.
2. *The Principles of Muhammadan Jurisprudence*, p. 50.

Every person does not possess تفقه فی‌الدین. It requires intelligence. According to the Qur'an and *Sunnah*, تفکر و تدبر is also called فقہ. In other words, تفکر و تدبر is a quality of *Fiqh* :

افلا یتدبرون القرآن (4 : 82) -

[تو پھر کیا قرآن میں غور نہیں کرتے ؟]

Then there is another very relevant and explicit verse which hints at the significance of فقہ :

ولو ردوہ الی الرسول و الی اولی الامر منھم لعلمہ الذین یستنبطونہ منھم (4 : 83) -

[اگر وہ اس بات کو رسول اور اپنے علما کی طرف لوٹاتے تو وہ علما اسے جان لیتے جو ان میں سے استنباط کرتے ہیں -]

This verse shows :

(*a*) That deduction of مسائل is فقہ.

(*b*) Only a few among the Companions could deduce law (منھم).

(*c*) That استنباط (deduction) is always with علم (knowledge).

(*d*) That اولوالامر are فقہا (jurists) and not the so-called persons in authority.

Fiqh may also be equated with حکمت as it is clear in the following Qur'anic verse (2 : 269) :

و من یوت الحکمۃ فقد اوتی خیراً کثیرا وما یذکر الا اولوالالباب -

[اور جس کو دین کا فہم مل جائے اس کو بڑی خیر کی چیز مل گئی اور نصیحت وہی لوگ قبول کرتے ہیں جو عقل والے ہیں -]

'Allamah Iqbal says :

بدست صوفی و ملا اسیری — حیات از حکمت قرآن نہ گیری
بہ آیاتش ترا کار جزیں نیست — کہ از یسیں او آسان بمیری

The importance of learning *Fiqh* may also be found in the following *Hadith* :

من یرد اللہ بہ خیراً یفقہ فی الدین (بخاری) -

[To whom Allah intends favour, He blesses him with the understanding of religion.]

It shows that *Fiqh* is a blessing of God :

فقیہ واحد اشد علی الشیطان من الف عابد (ترمذی بروایت ابن عباس) -

[A single jurist is more [powerful over Satan than a thousand pious men.]

The Holy Prophet prayed for his cousin 'Abdullah ibn 'Abbas :

اللھم فقہ فی الدین -[3]

The second version is : اللھم علمہ الکتاب والحکمۃ -

Again in the words of 'Allamah Iqbal this *Hadith* is amplified :

آں کتاب زندہ قرآن حکیم — حکمت او لایزال است و قدیم
نوع انسان را پیام آخریں — حامل او رحمۃ للعالمین

Sh. Waki' (شیخ وکیع محدث) used to say that the people would not be benefited with *Hadith* without knowing *Fiqh*.[4]

The Qur'an says : لیتفقھوا فی الدین [that they may gain understanding in religion]. It is obvious that during the days of the Holy Prophet the term *Fiqh* was used in its wider sense. Besides its legal aspect it also covered theological, economic and political aspects. Its original meaning changed later on when

3. Ibn Sa'd, "طبقات الکبریٰ," II, 363.
4. Kurdari, "مناقب الامام".

it became narrow. Then it began to be applied to the legal problems.

Fiqh is distinct from *Shari'at*. "*Shari'at* is the wider circle, it embraces in its orbit all human actions. *Fiqh* is the narrow one, and deals with what are commonly understood as legal aspects."[5] The Holy Qur'an says (5 : 48) :

لكل جعلنا منكم شرعة و منهاجا ۔

[For each We have appointed a Divine law and a traced-out way.]

In other words, *Shari'at* is a Code of Islamic Law.

5. Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, p. 21.

Chapter 5

ISLAMIC JURISPRUDENCE IS MORE SCIENTIFIC THAN BRITISH JURISPRUDENCE

Islam is a religion which respects the human nature. That is why it is termed as دین فطرت.

فطرة الله الّ ی فطر الناس علیها لا تبدیل لخلق الله ذلک دین القیم و لکن اکثر الناس لا یعلمون (30 : 30) ۔

[The nature of Allah, in which He hath created man. There is no altering (the laws of) Allah's creation. That is the right religion, but most men know not.]

Islam acknowledges all the previous instructions imparted by the Prophets because they also preached دین فطرت. This religion is eternal. Islam claims that its religious education is protected. The Qur'an is without any interpolations : انا نحن نزلنا الذکر و انا له لحفظون (15 : 9). Moreover, this religion encourages meditation (تفقه فی الدین). In the early days of Islam a class of such erudite scholars came into being who carried a strenuous research work in the religious sphere. The Muslim scholars worked very hard for jurisprudence. Especially Imam Abu Hanifah along with his disciples compiled judicial works which are unparalleled in the world. Even the British jurists could not compete this school. That is why Imam Abu Hanifah is regarded as one of the greatest

jurists. He possessed a remarkable power of reasoning and deduction. The other three *Imams*, viz. Malik, Shafi'i and Ahmad b. Hanbal, were also endowed with talents of an exceptional nature. They enjoyed a great reputation as jurists. Due to the combined efforts of the above-noted *Imams* it can be safely said that Islamic jurisprudence has become more scientific than British jurisprudence. Even Edmund Burke, the famous British statesman, in his well-known *Impeachment of Warren Hastings*, had declared in unequivocal terms that Muslim law and jurisprudence were the loftiest in the world. Now we may enumerate the points of perference.

(1) Islamic jurisprudence is according to the principle of reason (اصول عقلی). Its more important characteristic is that its مسائل are based on اسرار or مصالح (expediency). The مصلحت or غائت of the major مسائل is mentioned in the Qur'an, e.g. the مصلحت of prayer is تنهیٰ عن الفحشاء و المنکر (29 : 45). The فرضیت of fast (صوم) is لعلکم تتقون (2:183). For *jihad* it is mentioned in the Holy Book (2 : 193) حتیٰ لا تکون فتنة. In the same way we can generalise this principle, i.e. the مصلحت or غائت is explained, patent or latent, in the Qur'an and *Sunnah*. This difference becomes more evident when we compare the مسائل of Islamic jurisprudence with the مسائل of the jurisprudence of other religions. The propositions (مسائل) of معاملات as well as عبادات are according to reason. In order to prove a proposition Imam Abu Hanifah brought دلائل نقلی (precedents or factual arguments) as well as وجوه عقلی

(reasoning).

(2) Islamic jurisprudence is simpler and more plain than the British one. It is more lucid and easier than its adversary.

The Qur'an says (2 : 286) : لا یکلف الله نفساً الا وسعها. [Allah asketh not a soul beyond its scope]. The Prophet says : "I have come with an easy and mild *Shari'ah*." Moreover, this religion is superior to other religions in this respect also that it does not believe in hermitage (لا رهبانیة فی الاسلام) and its prayers are not troublesome.

(3) The principles on معاملات are comprehensive and according to the needs of every age. The greatest part of jurisprudence which is concerned with worldly affairs is معاملات (transactions). Islam presents the principles of contract (معاهدات) and documents : اوفوا بالعهد ان العهد کان مسئولا (17 : 34). The rules of justice and evidence are also scientific : اعدلوا هو اقرب للتقویٰ (5 : 8).

(4) The احکام of Islamic jurisprudence are deduced from نصوص (a technical term used by the jurists for a Qur'anic verse or a valid حدیث).

(5) In British jurisprudence what more complains of is the practical hardship and inconvenience of some rule or process of law. They know, for example, that the law of real property is exceedingly complicated and that, among other things, it makes the conveyance of land expensive.[1]

1. *Encyclopaedia Britannica* (XI Ed.), XV, 579.

(6) English jurisprudence is confused, indeterminate, inadequate, ill-adapted and inconsistent as to a vast extent the provision or no provision would be found to be that has been made by it for the various cases that have happened to present themselves for decision."[2]

(7) English jurisprudence is indebted to Roman Law.

(8) English jurisprudence is based on customs and usages, but Islamic Law is derived and deduced from the Qur'an and *Sunnah*.

(9) It deals only with the temporal aspect of life. "English jurisprudence tends naturally to assume the analytical and historical form to the exclusion of the ethical."[3] Islamic jurisprudence, on the contrary, tends naturally to assume the ethical form also.

2. Jermey Bentham, *Law Reformer.*
3. Salmond, *On Jurisprudence,* p. 9.

Chapter 6

SOURCES OF LAW

(*a*) *Sources of Islamic Law.* According to Hanafis, the following are the sources of Muslim law : (1) The Qur'an, (2) *Sunnah* or the *Ahadith*, (3) *Ijma'*, (4) *Qiyas*.

According to Shi'ahs there are only the following three sources :

(1) The Qur'an.
(2) The *Ahadith.*
(3) The *Reason.*

They do not consider *Ijma'* and *Qiyas* as sources of Muslim law.

The following are also considered as sources of Muslim law :

(1) Custom.
(2) Judicial decisions.
(3) Legislation.
(4) Justice, equity and good conscience.

Briefly, the sources of Muslim law mentioned above are as under :

(1) *The Holy Qur'an.* The term *Qur'an* is used in two meanings : (1) as participle (to read) پڑھنا, (2) as an object, a thing which is read (جو چیز پڑھی جائے). Technically speaking, both these meanings are attributed to the Qur'an. God says :

تلک آیات الکتاب و قرآن مبین (54 : 1) -

ذلک الکتاب لا ریب فیه (2 : 2) -

تلک آیات الکتاب المبین ـ انا انزلناه قرآنا عربیاً لعلکم تعقلون (12 : 1-2) -

بل هو قرآن مجید فی لوح محفوظ (85 : 21-22) -

انه لقرآن کریم فی کتاب مکنون لا یمسه الاالمطهرون ـ تنزیل من رب العالمین (56 : 77-80) -

It is evident from the above verses that کتاب or the Holy Qur'an was brought by the angel Gabriel to the Holy Prophet in the Arabic language :

نزل به الروح الامین علیٰ قلبک لتکون من المنذرین ـ بلسان عربی مبین (19 : 193-195) -

[Which the True spirit hath brought down upon thy heart, that you mayst be (one) of the warners, in plain Arabic language.]

The primary source of laws in the Islamic system is the Holy Qur'an. That is a Book of God as is obvious from these verses :

تنزیل الکتاب لا ریب فیه من رب العالمین (2 : 32) -

[یہ کتاب یقیناً خدا کی طرف سے نازل ہوئی ہے -]

انا انزلنا الیک الکتاب بالحق لتحکم بین الناس بما اراک الله (4 : 105) -

[اے محمد ! بے شک ہم نے آپ پر یہ کتاب نازل فرمائی ساتھ حق کے تا کہ آپ خدا کے حکم کے مطابق لوگوں کو حکم دیں -]

The Holy Qur'an was revealed in parts to the Holy Prophet during a period of twenty-three years. Mr Sobhi Mahmassani writes :

"قرآن کی آیات اسلامی معاشرے کے حالات کے تقاضوں کے مطابق

وقتاً فوقتاً نازل ہوئیں اس لیے یہ حالات اسباب و نزول کہلائے" -

The Qur'an is the first source of law in point of time as well as in point of importance. In Muslim law the term "law-giver" stands for God Who is the source and inspiration of all Islamic legislation. The Holy Prophet is only the interpreter of the Divine will to the Muslims.

(2) *Hadith*. *Hadith* may be defined as the words (اقوال), actions (افعال) and speech (تقریر) of the Holy Prophet.

There are several verses in the Holy Qur'an in which the obedience of the Prophet is ordained. This obedience is not for the time being but for all times to come (ابدا لاباد). A few verses may be quoted thus :

لقد کان لکم فی رسول الله اسوة حسنه (33 : 21) -

اطیعوا الله و اطیعوا الرسول (4 : 59) -

من یطع الرسول فقد اطاع الله (4 : 80) -

قل ان کنتم تحبون الله فاتبعونی یحببکم الله (3 : 31) -

کی محمد سے وفا تو نے تو ہم تیرے ہیں
یہ جہاں چیز ہے کیا لوح و قلم تیرے ہیں

من یطع الله و رسوله فقد فاز فوزاً عظیما (33 : 71) -

و ما ارسلنا من رسول الا لیطاع باذن الله (4 : 64) -

ما رمیت اذ رمیت و لکن الله رمیٰ (8 : 17) -

ما ینطق عن الهویٰ ان هو الا وحی یوحی (53 : 3-4) -

The obedience of the Holy Prophet is in fact the obedience of God.

انہی کے مطلب کی کہہ رہا ہوں زبان میری ہے بات ان کی
انہی کی محفل سنوارتا ہوں چراغ میرا ہے رات ان کی

Hadith is an appendix and interpretation of the Qur'an. It explains the brief verses of the Qur'an and elucidates the meanings of its principles. *Sunnah* is obligatory on all the Muslims as it is clear from this communication :

وما اتاكم الرسول فخذوه وما نهاكم عنه فا نتهوا (59 : 7) -

The Hanafis agree that, although the *Hadith* is ضعيف, yet it is superior to قياس and اجتهاد (شرح سفر العادة). According to the majority of jurists, an authentic خبر واحد is reliable and when it is corroborated by circumstances, then it will be accepted.

According to Hadrat 'Aishah, the life of the Holy Prophet was the practical interpretation of the Qur'an.

" كان خلقه القران" (الحديث) -

Hadith and Sunnah Distinguished. (*i*) *Sunnah* is the practice (افعال) of the Prophet whereas *Ahadith* are the statements or dictates of the Prophet which he pronounced (اقوال).

(*ii*) *Sunnah* may be embodied in *Hadith* but is not itself a *Hadith.*

(*iii*) It is possible for *Hadith* to contradict *Sunnah.*

The difference between the Qur'an and the *Sunnah* is in the fact that the former contains the very words of Allah, while the latter are in the Prophet's own language. Mr F.B. Tyabji says :

"If the Book is silent, it is supplemented by or interpreted in the light of the practice of Prophet. Traditions recording the actions and sayings of the Prophet, thus, take their place at the

second of the '*asls*' or main sources of the laws and institutions of Islam."[1]

The precepts of the Holy Prophet in all matters of law and religion were inspired and suggested by the Almighty, though expressed in his own language. So the Qur'an and Traditions have a common element of divinity. The Prophet never said anything unless he was inspired by God and his dicta had the sanctity of law. Hadrat Shah Waliyullah says :

"خدا تعالیٰ نے آپ کو شرع کے مقاصد اور وہ قانون تعلیم کیا تھا جس سے حکم شرعی یا آسانی کا طریقہ یا کسی امر کو مستحکم اس سے کر سکتے تھے - اسی قانون سے آپ ان مقاصد کی توضیح فرما دیا کرتے تھے جو بذریعہ وحی آپ کو حاصل ہوتے رہتے تھے" -[2]

(3) *Ijma'*. *Ijma'* or consensus of juristic opinion is the third source of the Islamic law. In *Taudith* "توضیح" it is defined as "agreement of jurists among the followers of Muhammad (peace be upon him) in a particular age on a question of law". The common people have no say in it. Their difference of opinion carries no weight. When the jurists agree on a particular question of law, the *Ijma'* will be proved.

Ijma' has the text of the Qur'an and *Hadith* to its backing. In fact it is a universal agreement of great jurists. It is a source of laws subordinate to the Qur'an and *Hadith.* Mr Sobhi Mahmassani in his book فلسفۂ شریعت اسلام defines it like this :

"کسی حکم شرعی پر کسی زمانہ میں مسلمان مجتہدوں کا متفق ہو جانا اجماع کہلاتا ہے - شیعوں کے نزدیک ائمہ مجتہدین کے متفقہ فیصلہ کی

1. *A Handbook on Muhammadan Law,* p. 4.
2. "حجة الله البالغه," Chap. 7, p. 231.

تائید امام معصوم کے قول سے بھی ہوتی ہو' نہ یہ کہ صرف علمائے مجتہدین کسی رائے پر متفق ہو جائیں -"[3]

Text in Its Support. The authority of *Ijma'* as a source of law is founded on Qur'anic and Traditional texts.

یا ایها الذین آمنوا اطیعوا الله و اطیعوا الرسول و اولی الامر منکم فان تنازعتم فی شیٔ فردوه الی الله و الرسول (4 : 69) -

[O ye who believe, obey Allah, obey the Messenger and those of you who are in authority and if you have a dispute regarding any matter refer back to Allah and His Messenger.]

و من یشاقق الرسول من بعد ما تبین له الهدیٰ و یتبع غیر سبیل المومنین نوله ما تولیٰ و نصله جهنم و ساءت مصیرا (4 : 115) -

[But whosoever shall sever from the Prophet after the guidance had been manifested to him and shall follow any other than that of the Faithful, We will turn Our back on him as he hath turned his back on Us and We shall cast him into the Hell—an evil journey thither.]

فاسئلوا اهل الذکر ان کنتم لا تعلمون (16 : 43) -

[If you yourself do not know, then question those who do.]

کنتم خیر امة اخرجت للناس تامرون بالمعروف و تنهون عن المنکر (3 : 110) -

[You are the best of men, and it is your duty to order men to do what is right and to forbid them from practising what is wrong.]

امتی لا تجمع علی الخطاء او علی الضلالة (مناوی : "کنوز الحقائق" بروایت ابن ابی عاصم) -

[My followers will never agree upon what is wrong or astray.]

ما رآه المسلمون حسناً فهو عند الله حسن وما راه المومنون قبیحاً فهو

3. "فلسفۂ شریعت اسلام," pp. 177, 182.

عند الله قبیح (ترمذی) -

[Whatever the Muslims hold to be good is good before God and whatever the Muslims hold to be bad is bad before God.]

الزموا الجماعة فمن شذ من الجماعة شذ فی النار -

[Whoever separates himself from the main body will go to Hell.]

"It is incumbent upon you to follow the most numerous body."[4]

The protecting hand of God is over the entire body and no account will be taken of those who separate themselves.

Mr Sobhi Mahmassani says in his last remarks of اجاع as :

"جن مسائل کے متعلق قرآن و سنت میں یا تو سرے سے کوئی حکم موجود نہ ہو یا ہو تو صریحی حکم نہ ہو' ایسے مسائل میں تغیرات زمانہ اور فقہائے مجتہدین کی آرا کے زیر اثر اجاع اسلامی قانون سازی کا ذریعہ بن جاتا ہے -"[5]

Ijma' is one of the essential principles of Sunni jurisprudence. The Shafi'is and the Malikis recognise the authority not merely in matters of law and religion but also in matters such as organisation of army, preparation for war and other questions of executive administration. The election of Abu Bakr as Caliph by the votes of the people was based on the principle of *Ijma'* (اجاع).

The legal effect of اجاع is that the law laid down by it is authoritative and binding.

(4) ***Qiyas* (*Analogy*).** After the Holy Qur'an, *Ahadith* and *Ijma'*, the fourth source of Islamic law

4. "کشف الاسرار," III, 258. 5. Op. cit., p. 182.

is قیاس (*Qiyas*). The root meaning of the word *Qiyas* is measuring, accord and equality. Sir Abdur Rahim writes that in matters which have not been provided for by a Qur'anic or Traditionary text nor determined by *Ijma'*, the law may be deduced from what has been laid down by any of these three authorities by the use of *Qiyas*.[6]

It is a method of deciding a problem by analogical deduction from known to unknown. Maulana Habibur Rahman Siddiqi Kandhalvi writes in his book "اصول فقه" that :

"قیاس ایسی دو چیزوں کے درمیان واقع ہو سکتا ہے کہ جن کے درمیان کوئی امر مشترک موجود ہو اور جس کی بدولت حکم واحد میں ہر دو کو مشترک کہا جا سکے اور وہ فرع ایسی ہو کہ اس کا حکم پہلے سے صراحۃ مذکور نہ ہو کیونکہ اگر حکم موجود ہوگا تو قیاس کی کوئی ضرورت باقی نہ رہے گی ۔"

Qiyas discovers law but does not create a new law. It widens the application of law contained in the text.

Arguments against Qiyas. (*i*) The Zahiris, some Hanbalis and Shi'ahs maintain that the use of *Qiyas* would virtually amount to making laws which is the sole privilege of God.

(*ii*) The Qur'anic verse quoted in support of the argument is :

و نزلنا علیک الکتاب تبیاناً لکل شیٔ (16 : 89) ۔

[We (God) have sent down the Book as authority for you.]

لا رطب ولا یابس اِلا فی کتاب مبین (6 : 59) ۔

6. *The Principles of Muhammadan Law*, pp. 137-38.

(*iii*) There is nothing fresh or dry, but is to be found in the revealed Book.

فقل ما لا یوجد فی کتاب اللہ تعالیٰ محرماً لا یکون محرماً ۔

[Say, whatever is not found to be forbidden in the Book of God is lawful to men.]

وما اختلفتم فیه من شیٔ فحکمه الی اللہ (42 : 10) ۔

[جس مسئلے میں تمہارا اختلاف ہو اس کے فیصلے کے لیے اللہ کی طرف رجوع کرو ۔]

Morever, they also deduce the conclusion that it is due to *Qiyas* that there is such a diversity of رائے and مذاہب.

The Sunnis, on the other hand, rely on the authority of the following texts in support of analogy or *Qiyas*.

The Qur'an says :

و تلک الامثال نضر بها للناس و ما یعقلها الا العالمون (43 : 29) ۔

[As for these similitudes We coin them for mankind but none will grasp their meaning save the wise.]

فاعتبروا یا اولی الابصار (59 : 2) ۔

[So learn a lesson, O ye who have eyes.]

There is a tradition of the Holy Prophet which says : "Where there has been no revelation on any issue, the Prophet decided them by means of his own opinion."

انا اقضی بینکم بالرای فیما لم ینزل فیه وحی ۔

[جن معاملات کے لیے وحی نازل نہیں ہوتی ان کا فیصلہ میں اپنی رائے سے کرتا ہوں ۔]

In the second *Hadith* the Holy Prophet said to

Ibn Mas'ud :

اقض بالكتاب والسنة اذا وجد تها فاذا لم تجد الحكم فيها اجتهد رايک ۔

The same words were uttered by the Holy Prophet to Mu'adh b. Jabal (معاذ بن جبل) on his appointment as a *Qadi* of Yemen.

Qiyas by the Holy Prophet. It is said that a woman of Juhainah tribe came to the Prophet and said that her mother who wanted to perform *Hajj* had died. She asked whether it was necessary for her to perform *Hajj* on her behalf. The Holy Prophet replied : What would you do if she had left debts ? Naturally, you would pay it.

It is quite evident that the Prophet resorted to analogy in this matter.

The Qur'an forbids the marriage of two sisters by a man :

و ان تجمعوا بين الاختين (4 : 23) ۔

As this is a case of قطع رحمی and بے غیرتی, so keeping it as an effective cause (علت), the Holy Prophet ordered :

لا يجمع بين المراة و عمنها ولا بين المراة و خالتها ۔

The Holy Prophet included aunt and niece under this order of prohibition.

In the same way the *Nikah* with a foster (رضاعی) mother and sister is forbidden.

و امهاتكم اللتی ارضعتكم و اخواتكم من الرضاعة ۔

The same *'Illat* which is found in the prohibited

degree is also there in fosterage. The Holy Prophet said :

يحرم من الرضاع ما يحرم من النسب ۔

Qiyas *by the Companions*. Hadrat 'Umar consulted the Companions for the punishment of a drunkard. Hadrat 'Ali said :

"تطبق عليه حد المفترى اى ثانين جلدة لانه اذا شرب سكر هذى و اذا هذى افترى ("موطا") ۔

[شرابی کو تہمت لگانے والے کی سزا دیجیے، یعنی ۸۰ کوڑے ، کیونکہ جب اس نے شراب پی تو اس کو نشہ ہوا اور جب نشہ ہوا تو بیہودہ بکا ۔ جب بیہودہ بکا تو تہمت لگائی ۔]

The Qur'anic text is as follows :

والذين يرمون المحصنت ثم لم ياتوا باربعة شهداء فاجلدو هم ثانين جلدة ولا تقبلوا لهم شهادة ابداً و اولئک هم الفسقون (24 : 4) ۔

[And those who accuse honourable women but bring not four witnesses scourge them (with) eighty stripes and never (afterward) accept their testimony. They indeed are evil-doers.]

So the punishment of the drunkard is based on *Qiyas* inferring from the above آیت.

Mr Sobhi Mahmassani holds :

"مذاہب اسلامی کے اختلاف کا ایک سبب قیاس بھی ہے ۔ شیعہ امامیہ، داؤد ظاہری اور ان کے مقلدین نے تو قیاس کو تسلیم ہی نہیں کیا ۔ البتہ جمہور فقہا اور شیعہ زیدیہ کے نزدیک قیاس قابل قبول ہے ۔

"اسی طرح جمہور فقہا کا اس میں بھی اختلاف ہے کہ قیاس کس حد تک قابل اعتماد ہو سکتا ہے ۔ چنانچہ اہل رائے یا عراقی اسکول نے تو اس میں بڑی سختی برتی ہے ۔ بعض احناف نے یہاں تک کہ دیا ہے کہ قیاس کے معاملہ میں دو چیزوں کی مماثلت ہی کافی ہے اور علت مشترکہ کی بھی ضرورت نہیں ۔ ادھر احمد بن حنبل نے حدیث مرسل اور ضعیف حدیث کو

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"اسی طرح جمہور فقہا کا اس میں بھی اختلاف ہے کہ قیاس کس حد تک قابل اعتماد ہو سکتا ہے - چنانچہ اہل رائے یا عراق اسکول نے تو اس میں بڑی سختی برتی ہے - بعض احناف نے یہاں تک کہ دیا ہے کہ قیاس کے معاملہ میں دو چیزوں کی مماثلت ہی کافی ہے اور علت مشترکہ کی بھی ضرورت نہیں - ادھر احمد بن حنبل نے حدیث مرسل اور ضعیف حدیث کو

قیاس پر ترجیح دی ہے اور کہا ہے کہ قیاس کو تو اشد ضرورت کے وقت ہی استعمال کرنا چاھئیے" ۔[7]

Qiyas is of the same essence as the *Ijma'* for it is also an opinion of the learned based on analogy, with this difference that *Ijma'* is a consensus of the opinion of the learned, on the other hand, *Qiyas* is an opinion based on the similitude of circumstances.

(*b*) *Sources of British Law.* The philosophical schools treat under the heading of the source of law some of the deepest problems of legal philosophy. The source of law is only one aspect of the general study of the validity of law.

Salmond divides sources of law into formal and material. Matter of law is derived from the material sources and validity to that matter is given by formal source. The formal source of all the body of law is one and the same, namely, the will and form of the State as manifested in the statutes or decisions of the Courts of Justice, e.g. an agreement is a material source of law. When it is upheld by the court of law it becomes the formal source.

Material Source and Its Division. Material sources are divided into legal and historical sources. Legal source is that which is recognised by law. On the other hand, historical source is that which is not recognised by law. Again, the former is authoritative, but the latter is non-authoritative.

Legal Source of English Law. Two main sources

7. Op. cit., pp. 185-86.

of English law are legislation and precedents. According to Salmond, law is divided into :

(*i*) Enacted law having its source in legislation.

(*ii*) Case law having its source in judicial precedents.

Besides these two sources there are two more, namely :

(*i*) Customs which give rise to customary law.

(*ii*) Conventions giving rise to conventional law.

Legislation. Legislation is defined as the declaration of legal rules by a competent authority. When it creates a right it is known as prescription, whereas it is a source of law, it is known as custom. Similarly, the courts when pronouncing judgment are also exercising legislative functions.

In a wide sense the term "legislation" is used to denote all the methods of law-making. If that is so, then the act of the parties to a contract laying down a rule of law may amount to that exercise of legislative powers.

In a still wide sense according to Salmond, legislation includes every expression of the will of the legislature whether it makes the law or not. If that is so, then every Act of the Parliament is legislation, irrespective of its purpose and effect.

There are two kinds of legislation.

Supreme and Subordinate. Supreme is that which proceeds from the Sovereign power of the State. It is incapable of being repealed or annulled by any other legislative authority. Subordinate is that which

proceeds from any authority other than the sovereign power. It is dependent for its existence on some superior authority.

(1) The Legislation of the Imperial Parliament is supreme for what the Parliament doth no authority upon earth can undo.

(2) All other forms of legislative activity recognised by the law of England are subordinate. They may be regarded as having their origin in delegation of the power of Parliament to inferior authorities, which, in the exercise of their delegated functions, remain subject to the control of the sovereign legislation, e.g. (*a*) Colonial powers of the self-government entrusted to the Colonies are subject to the control of the Imperial legislation ; (*b*) Executive ; (*c*) Judicial ; (*d*) Municipal ; (*e*) Autonomous bodies.

Interpretation of Statutes. Common interpretation is of two types, namely, (1) Grammatical and (2) Logical. Grammatical or literal interpretation is that which deals with purely verbal expression of law. Logical, on the other hand, is that which departs from the letter of the law and finds out the intention of the legislature from other sources.

According to Mr Paton there are three fundamental rules suggested in the English cases ; firstly, the literal rule that if the meaning of a section is plain, it is to be applied whatever the result ; the "Golden Rule" that the words should be given ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the instrument; and the "mischief rule," which emphasises the general policy of the Statutes and the evil at which it was directed.

Precedents. Legal precedents are the products of the judge. They are no more than an expert legal opinion. In England, a judicial precedent is an authority which should be followed by the judge. Salmond divides precedents as under :

(1) Original, those which create law.

(2) Declaratory, which were declared law.

A declaratory precedent is one which is merely the application of an already existing rule of law ; an original precedent is one which creates and applies a new rule.

Again, there are authoritative and persuasive precedents.

An authoritative precedent is one which the judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow. They will take into consideration and will attach such weight as it seems to them to deserve. The former are the decrees of the superior courts of justice and the latter may be the following :

(1) Foreign judgments more especially those of American courts.

(2) Decisions of superior courts in other parts of British Empire.

(3) Judicial dicta.

Custom. "Custom," according to Mr Paton, "is useful to the lawgiver and condifier in two ways. It provides the material out of which the law can be fashioned—it is too great an intellectual effort to create law *de novo*. There is inevitably a tendency to adopt the maxim 'whatever is is right'. What has been followed in the past is a safe side for the future. The reason for the reception of customary law is that since custom contains rules already accepted, courts find it convenient to adopt as a law instead of making some new rules which may evolve the difficulty. Secondly, the adopting of a particular custom as law provides a guarantee for its continuous adoption in future. Legal custom, according to Salmond, is recognised independently of a contract. These may be local or general. The former is that which prevails in some defined locality only, such as a borough or county and constitutes a source of law for that place only. The latter is that which prevails throughout England, and constitutes one of the sources of the Common law of the land."[8] Statute may embody a custom, but if custom conflicts with a statute, custom is automatically abrogated.

In order that a custom may be valid and operative as a source of law, it must conform to certain requirements laid down by law. The chief of these are the following :

(1) Reasonableness.
(2) Conformity with the Statute law.

8. *A Text-Book of Jurisprudence.*

(3) Observance as of right.
(4) Immemorial antiquity.

(*c*) *Sources of Law Acually in Vogue in Pakistan.* The following are the sources of law :

(1) Custom or personal law.
(2) Statute law.
(3) Justice, Equity and good Conscience.

The only law with a local genesis was a rule of custom in Pakistan and this source of law has been abolished by various *Shari'at* Application Acts and Ordinances. Although the Islamic *Shari'at* has given sanctity to local usages and customs in all walks of human activities, which is called عرف but our legislators had done away with the local عرف thinking most probably that it was of Hindu origin. For example, on the death of a Muslim there is instantaneous succession to the property left by a deceased. The shares of Muslim heirs and successors are quantitatively laid down in the Qur'an and amplified in the *Sunnah.* Every Muslim heir gets his portion of title in the estate of the deceased and has full power to deal with it. When the widow gets her share under *Shari'at*, be it one-fourth or one-eighth, she can deal with it any way she likes. Similarly, other co-heirs of three-fourth or seven-eighth share can also strike bargain on their respective title. Under Custom the widow was given this share by way of عاریت and the usus of the entire corpus left by the deceased was till death or remarriage which ever be earlier. But with the advent of the Muslim Personal Law

(*Shari'at*), 1937, this custom was abolished. It operated throughout India. Still, in some contracts customs are applicable which are not against public policy.

English Common Law does not apply in this country by its own force as English Common Law, but as rules or principles of justice, equity and good conscience, e.g. law of Torts is not a statutory law, but it applies as justice, equity and good conscience. It can also be modified according to the needs of the society.

Where there is no statute, the principles of justice, equity and good conscience will apply. Where the law is silent, equity steps in. Our courts are courts of law as well as of equity. When the law does not help a person, then equity comes to its help. That is why it is often said the law is against you but equity is in your favour. Sir Abdur Rahim says :

> "In Muhammadan Jurisprudence law is personal in its application to the Muhammadans, i.e. it is not affected by the constitution of a particular political society. This is because the authority of law, according to Muhammadan theory, is primarily based on men's conscience and not on political force."[9]

9. *The Principles of Muhammadan Jurisprudence*, p. 59.

Chapter 7

THE PHILOSOPHICAL REASONS OF BASING THE ENTIRE LEGAL SYSTEM ON THE DIVINE REVELATION

Before writing on the subject in hand it is proper to define the term "revelation" or وحی. Its literal meaning is :

"اشارہ کرنا ، ارسال یعنی پیغام بھیجنا یا بتانا ، چپکے سے کسی سے کچھ کہہ دینا اور فطرتاً کسی حکم پر مامور و مقرر کر دینا" "جمهرة اللغة" لا بن درید) ۔

In technical terms وحی means :

"شریعت اسلامی کی اصطلاح میں جو کلام یا اشارۂ الہی نبیوں یا رسولوں کی طرف بھیجا جاتا ہے وحی کہلاتا ہے ۔"

A revelation does not emanate from the human mind. It comes from God to Prophets, direct or indirect. The Holy Qur'an says with reference to the Holy Prophet :

قل انما انا بشر مثلکم یوحیٰ الی (18 : 110) ۔

ان هو الا وحی یوحیٰ (53 : 4) ۔

It must be borne in mind that every word of revelation (وحی) is the very word of God. The Qur'an was revealed by God Who is the fountainhead of all knowledge as it is clear from this verse :

و علمک ما لم تکن تعلم (4 : 113) ۔

[اللہ تعالیٰ نے آپ کو وہ سکھایا جو آپ نہ جانتے تھے۔] —

Mr Sobhi Mahmassani says :

"شریعت اسلامی اپنے مآخذ اور بنیادی احکام کے لحاظ سے خدائی شریعت ہے ۔ ۔ ۔ ۔ سب سے پہلا قانون ساز اللہ تعالیٰ ہے جس نے قرآن کریم میں آنحضرت صلی اللہ علیہ وسلم کی زبان مبارک پر قانون نازل فرمایا اور یہ کہ شرع اسلامی بنیادی اعتبار سے قانون الہی ہے۔"[1]

The foundation of the Muslim law was laid down by the Almighty Himself through revelation. He is the Lawgiver.

Now we come to the question regarding the philosophical reasons for basing the entire Islamic legal system on Divine revelation.

(1) The main reason is that the law based on وحی is authentic because authenticity is the mainstay of that law. Since it is in the very word of God, it is of the highest authority. It is free from arbitrariness and discretion. Such a law is more reliable and more forceful than man-made law. Mr Ahmad Hasan says :

"The Qur'an repeatedly appeals to human conscience to follow the teaching of the Revelation for its own welfare as well as for the well-being of fellow human beings. Thus the Qur'an, by making the observance of the rules of the *Shari'at* as a matter of human conscience, has dignified the concept of law and the ethical values of its teaching constitute the noblest and most perfect basis of universal law."[2]

(2) A law based on revelation is meant to lessen the hardships and miseries of people. The basic principle of Islamic law is the removal of inconveni-

1. "فلسفۂ شریعت اسلام," p. 18.
2. *Early Development of Islamic Jurisprudence*, p. xiv.

ence. The Holy Qur'an says :

لا یکلف اللہ نفساً الا وسعها (2 : 285) ۔

(3) The Islamic law, as it is founded on the revelation, is in accordance with the nature of human beings. It is hinted at in the Holy Qur'an that such a law will create a congenial atmosphere.

فطرت اللہ التی فطرة الناس علیها (30 : 30) ۔

(4) The law which is the outcome of the Divine revelation will be thorough, exhaustive and final. There will be no flaw in its framing. No loopholes can be found in its construction. The Holy Qur'an says :

الیوم اکملت لکم دینکم و اتممت علیکم نعمتی و رضیت لکم الاسلام دینا (5 : 3) ۔

(5) The Islamic law as based on revelation has the sanctity in its observance. The Muslims have due regard for this law because they realise that it is of Divine origin. Consequently, they abstain from finding fault with its validity, soundness and justness.

(6) God has Himself created man and implanted such characteristics in his self which distinguish him from other species. He holds the rank of اشرف المخلوقات. God bestowed on him the complete code of life (مکمل ضابطۂ حیات) and the constitution of life (دستور حیات) so that he may not waste his precious time in framing the laws by himself, rather to use it in the welfare and betterment of the society.

Chapter 8

BRIEF HISTORY OF THE COMPILATION OF THE HOLY QUR'AN

The Qur'an during the Time of the Holy Prophet. It is proved by اجاع and تواتر that the Qur'an was compiled under the orders of God. The Holy Prophet was guided by the angel Gabriel in this respect.

The Qur'an was revealed in parts to the Holy Prophet during a span of about twenty-three years. It is divided into *surahs* (سورہ) which are composed of verses (آیات). The arrangement of the *surahs* and verses is not according to the revelation (نزولی اعتبار), but in accordance with the subject (مضامین). Some brief *surahs* were revealed simultaneously but the verses of other *surahs* were revealed turn by turn. This work of collection and arrangement was completed during the lifetime of the Holy Prophet. No change has been effected since that time.

'Allamah Suyuti says :

"مسلمانوں کا اول سے آخر تک اس پر اتفاق ہے کہ آیتوں کی ترتیب خود رسول اللہ کی جبرئیل کے حکم سے دی ہوئی ہے ۔ اس ترتیب میں کسی قسم کی ترمیم خود قرآن کی ترمیم ہے ۔"[1]

Writing of the Revelation (کتابت وحی). The Holy Prophet had appointed expert scribes. When any

1 ۔ "تدوین قرآن"، افادات حضرت مولانا سید مناظر احسن گیلانی ، ص 98 ۔

incomplete and separate *surah* was revealed, the Holy Prophet directed the writers of revelation (کاتبان وحی) to write it accordingly. The Holy Prophet and حفاظ کرام learnt it by heart according to its arrangement.

According to one report, the famous writers of revelation were twenty-six but the second version is that their number was forty-two. The most illustrious among them are :

خلفائے اربعہ ، عامر بن فہیرہ ، ابی بن کعب ، زید بن ثابت ، معاویہ بن ابی سفیان ، یزید ابن ابی سفیان و خالد بن ولید ۔

The renowned حفاظ کرام were :

ابو زید ، زید بن ثابت ، ابی بن کعب ، معاذ بن جبل ، سالم بن معقل، عبداللہ بن مسعود ، ابوالدرداء ۔

The written part of the revelation was placed in the house of the Holy Prophet and one copy was kept by each scribe. This sacred duty of collection and compilation of the Qur'an was completed during the lifetime of the Holy Prophet. The present arrangement of the Holy Qur'an is the same.

The Companions of the Holy Prophet used to write and learn the Holy Qur'an by heart. During those days, paper was rare. Some Companions wrote it on paper but usually it was written on palm-leaves, epitaph of stones, broad shoulder bones of the camels and on pieces of skin. As it was difficult to consolidate such a scattered material, so the Qur'an was not in a single volume at that time. During the lifetime of the Prophet no need was felt for it. The Qur'an

was present in the minds of the حفاظ کرام with correct arrangement. For its security the Qur'an assures that :

ان علینا جمعه و قرآنه (75 : 17) -

[اس کا جمع کرنا اور پڑھنا ہمارے ذمے ہے -]

During the Prophet's time the Qur'an was in its written form. Some Companions wrote it in parts and the others had its complete copies. It is obvious from the verses of the Qur'an that it was in a written shape from its very beginning.

مولانا مناظر احسن گیلانی says :

"تاریخی روایات کا جو ذخیرہ قرآن کے جمع و ترتیب کے متعلق پایا جاتا ہے اگر یہ ذخیرہ نہ بھی پایا جاتا جب بھی اس مسئلہ کے تمام پہلوؤں کے متعلقہ سوالات کے جوابوں کو ہم خود قرآن میں ہی پا سکتے ہیں" -[1]

ذلک الکتاب لا ریب فیه (2 : 2) -

[یہ ایک نوشتہ ہے جس میں کوئی شک نہیں -]

و کتب مسطور فی رق منشور (52 : 2-3) -

[قسم ہے لکھی ہوئی کتاب کی جو کشادہ ورق میں ہے -]

انه لقرآن کریم فی کتاب مکنون - لا یمسه الا المطهرون (56 : 79) -

The Qur'an during the Period of Abu Bakr and 'Umar. In the battle of Yamamah (یمامہ) nearly seventy حفاظ کرام sacrificed their lives. So on the advice of 'Umar, Abu Bakr, the first Caliph, ordered the collection and compilation of the Qur'an. Zaid bin Thabit, a Companion, scribe of وحی, jurist and حافظ قرآن, was

3. Ibid., p. 9.

appointed by the Caliph to collect the Holy Qur'an. He compiled a volume (مصحف) very carefully. Its copies were prepared. One copy was retained by Abu Bakr. After his death it was in the custody of 'Umar, the second Caliph. After his death it was entrusted to his daughter ام المومنین حفصه.

The Holy Qur'an during the Period of 'Uthman. There were several tribes having different dialects in Arabia. Sometime the same word was used in different intonation and spelling, e.g. یفعل as یفعل and اسلم as عسلم. In some of the tribes the sign of plural was indicated by میم instead of ن. There was seven famous قرأت in Arabia. Again, till the reign of the third Caliph the Muslims had conquered several countries and various non-Arab nations came under the banner of Islam. Once Hudhaifah (حذیفہ), a Companion, went for Holy War (جہاد) on the northern frontier of Iraq and Iran. He saw a dispute over قرأت among the people there. In order to rectify this imperfection, 'Uthman assembled the امت on a single قرأت of Quraish making use of the doctrine of اجماع.

'Uthman got the volume of Abu Bakr from ام المومنین حفصہ and ordered زید بن ثابت, assisted by eleven members, to prepare its copies in the قرأت of قریش which was the exact intonation and pronunciation of the Holy Prophet. Then he sent one copy each to every province. 'Uthman is called جامع القرآن in this respect that he assembled the whole امت on a single قرأت of the Quraish, otherwise the collection of the Holy Qur'an was completed during the regime of Abu Bakr who was in

fact the first جامع القران. Since then there has been no alteration. There is, says Sir William Muir, "probably no other work in the world which has remained twelve centuries with so pure a text."[3]

مولانا مناظر احسن گیلانی says :

"جمع الناس علی مصحف واحد" عہد عثمان کی قرانی خدمت کی صحیح تعبیر ہے' یعنی مسلمانوں کو ایک ہی مصحف پر آپ نے جمع کر دیا- عوام نے ان کے اسی خطاب کو جامع القرآن سے مشہور کر دیا"۔[4]

Diacritical Marks (اعراب). At first there were no اعراب on the words of the Qur'an. They were applied after 50 H. In the beginning they were in the form of dots (نقاط). This duty was performed by ابو الاسود الدئلی, the disciple of 'Ali and his pupils. The final shape to اعراب was given by خلیل بن احمد, a renowned grammarian.

It was a great service of 'Uthman towards the Qur'an.

3. *Life of Muhomet.*

4. "تدوین قرآن" p. 56.

Chapter 9

LEGISLATIVE FUNCTIONS OF THE QUR'AN

The Holy Qur'an is the name of the Book consisting of those direct revelations which were made to the Prophet Muhammad (peace be upon him). It is in the very words of Allah. It was revealed peacemeal according to the needs of the people. Most of the verses containing rules of law were revealed with reference to cases which arose during the lifetime of the Holy Prophet. Sometimes God repealed certain previous laws and revealed others in their place which were suitable to the needs of the society. Sir Abdur Rahim says :

"When two texts are really in conflict, the one earlier in date is taken to have been repealed by the one later in date, as it cannot be conceived that God intended that two inconsistent laws should be in force at the same time."[1]

The authority to make law vests in Allah Who has the supreme legislative power (شارع) in the Islamic law. He alone is a Lawgiver. God revealed the laws to His Messengers from Prophet Adam to Muhammad (peace be upon him). During this long time God changed, modified and repealed the laws according to the changing needs of the time. Mr

1. *The Principles of Muhammadan Jurisprudence*, p. 11.

Sobhi Mahmassani says :

"قرآن کے قوانین حالات کے اقتضا کے مطابق تدریجاً اور اس بات کا لحاظ رکھتے ہوئے نازل ہوئے کہ عرب لوگ قدیم عادات کو ترک کرنے اور نئے احکام پر عمل پیرا ہونے کے لیے کہاں تک تیار ہیں جیسا کہ تحریم شراب اور جوئے کے مسئلے میں دیکھتے ہیں۔"[2]

Whenever there arose a dispute over any matters God revealed the verses (آیات) embodying rules of law in order to decide the cases in accordance with law. Such a law was most suited to settle the questions because God in His Wisdom better knows the remedy of their ills. There are some verses in the Qur'an which were revealed in order to repeal some bad customs that existed before Islam, e.g. infanticide, gambling and unlimited polygamy, etc. It also contains verses about social reforms like the questions of succession and inheritance, etc. These questions have been settled equitably and strictly in accordance with the norms of Islam. It also includes the penal laws for the purpose of maintaining peace and tranquillity in the society. These principles of law ensure the security of life and property in social life. In Islam law cannot be separated from justice. The goal of Islamic justice is to create such a healthy atmosphere wherein all the fundamental rights, security of life and property can be guaranteed. The Qur'an says : اعدلوا هو اقرب للتقوىٰ [Doing justice is nearer to observance of duty]. It further says : و اذا حكتم بين‌الناس ان تحكموا بالعدل [When ye judge between men and

2. "فلسفۂ شریعت اسلام," p. 15.

men, then ye judge with justice]. "The Qur'an," says Abdur Rahim, "contains general injunctions which have formed the basis of important juristic inferences."[3]

The Qur'an contains various orders, injunctions and communications which embody the fundamental principles regarding devotional matters (عبادات) and transactions (معاملات). It is the Book which is a Guide to religious and temporal affairs. The references of law are chiefly found in سورة البقره ، سورة النسا ، سورة آل عمران سورة المائده ، سورة النور ، سورة الطلاق ، سورة بنی اسرائیل ۔

Dr Sa'id Ramadan enumerates Family Laws in seventy injunctions, Civil Law in seventy, Penal Law in thirty ; Jurisdiction and Procedure in thirteen ; Constitutional Law in ten ; International Relations in twenty-five, and Economic and Financial Order in ten.[4]

The Holy Qur'an is a Code of Conduct laying down the fundamental principles (اصول) and not the detailed provisions (فروعات). Law became imperative to settle the matters of rights and duties and to decide the matters of disagreement and dispute. The Qur'an explains the position thus :

كان الناس امة واحدة فبعث الله النبين مبشرين و منذرين و انزل معهم الكتب بالحق لتحكم بين‌الناس فيما اختلفوا فيه (2 : 213) -

[Mankind were one community and God sent (unto them) Prophets as bearers of good tidings and as warners and revealed therewith the Scripture with the truth that it might judge

3. Op. cit., p. 71.
4. *Islamic Law, Its Scope and Equity*, p. 33.

between mankind concerning that wherein they differed.]

Main Sections. The Code of Islamic Law is mainly divided into three sections. The first Section deals with religion and its duties (عبادات). The second Section includes quasi-religious and quasi-social laws relating to marriage, divorce and inheritance, etc. The third Section deals with sales and purchases, lease and mortgages, evidence, torts and contracts. This Section is termed as transactions (معاملات). There is yet another Section called crimes and punishments (عقوبات).

Criticism of the View of the Orientalists that the Qur'an Has no Legal Potentials

It is misleading to say that the Qur'an has no legal potentials. This conception is the result of the biased minds of the Western world. It is the prejudice against Islam which compels them to find fault with its magnificent legal system. If the Orientalists study the Qur'an honestly and impartially, they can realise that it is a dynamic force. It is not like stagnant water. It is as fresh and potent as anything. The Qur'an is not meant for a limited period but for all times to come. The legal principles and dictas of the Qur'an have the inherent capacity for development. They are not rigid. There can be no change in the substance, but it has the elasticity in its interpretation and extension of application.

The Holy Qur'an provides the principles and avoids details. God, Who is the Lawgiver, revealed the

Law to His Messengers from Adam to Muhammad (peace be upon them). He changed, modified and repealed the laws according to the needs of the society. At present the law is in its complete form in the Holy Qur'an. There is no defect or flaw in it. The law is thorough and exhaustive. In other words, Qur'an is a complete finality on the question of law.

اليوم اكملت لكم دينكم و اتممت عليكم نعمتى و رضيت لكم الاسلام دينا (5 : 4) -

The Islamic law is complete in its entirety. Now, it requires no amendment and change. At the same time there is no rigidity in it. It can be interpreted and safely applied to every set of circumstances which may crop up in any age, country or society. It is endowed with the quality of adaptability.

There are two kinds of *ayat* or verses : (1) محكمات (2) متشابهات. The explicit commands are styled by God as ام الكتاب. On the other hand, متشابهات or the non-explicit are those which need explanation and expounding. From this analysis it is clear that the Qur'anic principles and commands are not rigid and limited. There is a possibility of various interpretations and application. The Qur'anic laws are applied through the doctrines of اجماع and قياس or اجتهاد. They have the Qur'an and *Hadith* to their backing. The analogical deduction is a great contribution to the study of Islamic jurisprudence. Short of this provision it would be difficult to decide cases of varied nature in the modern society. The Holy

Prophet anticipated such a situation in his dialogue with Mu'adh b. Jabal when he was appointing him as Governor of Yemen. The Holy Prophet appreciated معاذ بن جبل that he would use his private judgment in deciding cases in the light of the Qur'an and *Hadith*. Sir Abdur Rahim says :

> "In Muhammadan Jurisprudence the ultimate basis of and justification for law must be sought in human reason (عقل)."[5]

The Islamic law has been developed by the jurists. Its progress is mostly due to the construction of the principles and canons by the interpreters. The function of the interpretation is to discover the intention of the Lawgiver or the expounder of law either from his words or from his conduct. The jurists construed the Qur'anic laws in large volumes.

5. Op. cit., p. 51.

Chapter 10

THE QUR'AN AND THE WESTERN LEGAL MAXIMS

The Western legal maxims are no match to the Holy Qur'an. Sometimes they are termed as fiction. On the other hand, the Qur'an is in the very words of God. It is a reality. A sanctity is attached to it. It is based on Divine Revelations—pure and unadulterated. But the maxims are the product of human mind which are open to limitations, imperfections and misgivings.

It goes without saying that the maxims play a vital part in organising legal knowledge. They provide a valuable data for lawyers for their legal reasonings. Before the advent of writing, legal maxims were very helpful for scholars as they could lessen the burden upon their memory and the lengthy examples be covered by the use of such catch phrases. Its pertinent example is the maxim that "the dead give seisin to the living." In this maxim the whole idea is generalised in a few words. "In the ruder ages, without doubt, the great majority of questions respecting the rights, remedies and liabilities of private individuals were determined by an immediate reference to such maxims, many of which obtained in the Roman law, and are so mani-

festly founded on reason, public convenience and necessity, as to find a place in the code of every civilization."[1] Although these maxims are of vital importance in the evolutionary stage of every legal system, yet they are very likely to be misused. In other words, these maxims have their demerits also, e.g. the legal maxim that husband and wife are one person in law, is very misleading unless the necessary qualifications are made. That is why the maxims cannot become the basis for the classification of law. Consequently, they afford no harmony to the legal system. Moreover, in most of the cases they lack the capacity for development.

The Qur'an is a Book of fundamental principles (اصول). It avoids details (فروعات). The details are provided in *Ahadith*. The Qur'anic principles or laws are distinct from the Western legal maxims. The former are the God-made laws while the latter are man-made. The Qur'anic commandments or laws are never misleading, because they are not the outcome of the human reason. These fundamentals or اصول play an important role in the Islamic jurisprudence. The Holy Qur'an enriches the legal knowledge. It commands a pivotal position in the sources of Islamic law. It affords cohesion and uniformity in the Islamic legal system.

The Qur'anic principles have the capacity for development. They are not rigid. They can be construed and their application can be extended to every

1. Broom, *Legal Maxims*, Introduction.

set of circumstances. The Qur'anic canons have no tinge of fiction. Their application is not meant for a limited period but for all the times. This is the main proof of their divinity.

Mr Salmond says :

"Legal maxims are the proverbs of the law. They have the same merits and defects as other proverbs, being brief and pithy statements of partial truths. They express general principles without the necessary qualifications and exceptions and they are therefore much too absolute to be taken as trustworthy guides to the law. Yet they are not without their uses.

"The language of legal maxims is almost invariably Latin, for they are commonly derived from the Civil law, either literally or by adaptation, and most of those which are not to be found in the Roman sources are the invention of medieval jurists."[2]

Most of the legal maxims used in different legal systems of the world tally with each other as they are based on rules of natural justice. Islam being the religion of nature also recognises all those legal maxims which are based on the rules of natural justice. There are a number of Qur'anic verses where the laws laid down in different legal maxims have been described. The following are some of the instances of this nature :

(1) No one should be condemned unheard. The Qur'an says :

ولقد خلقنكم ثم صورنكم ثم قلنا للملئكة اسجدوا لادم فسجدوا الا ابليس لم يكن من السجدين ـ قال ما منعک الا تسجد اذا امرتک قال انا خير منه

2. *Jurisprudence*, p. 498.

خلقتنی من نار و خلقته من طین ـ قال فاهبط منها فما یکون لک ان تتکبر فیها فاخرج انک من الصغرین (7 : 11-13) ـ

[And We created you, then fashioned you, then told the angels : Fall ye prostrate before Adam. And they fell prostrate, all save Iblis, who was not of those who make prostration.

He said : What hindered thee that you didst not fall prostrate when I bade thee? (Iblis) said : I am better than him. Thou createdst me of fire while him Thou didst create of mud.

He said : Then go down hence. It is not for thee to show pride here, so go forth ! Lo ! thou art of those degraded.]

In the above verses the following stages are manifest :

(*a*) Opportunity of defence was given.

(*b*) Show-cause notice to Iblis to explain his conduct.

(*c*) His reply was obtained, considered and found unsatisfactory.

(*d*) Punishment announced.

(2) Retrospective punishment is unlawful. It means that no punitive act can be enforced with effect from the retrospective days. It is found in the verse of the Holy Qur'an :

ما کنا معذبین حتی نبعث رسولا (17 : 15) ـ

[Nor would We visit with Our wrath until We had sent Apostle to give warning.]

No act of omission and commission can be made permissible from a retrospective date.

(3) Necessities are estimated according to their quantity. We cannot inflict injury in self-defence

more than which is required. The Qur'an says :

انما حرم علیکم المیتة والدم و لحم الخنزیر و ما اهل به لغیر الله فمن اضطر غیر باغ ولا عاد فلا اثم علیه ان الله غفور رحیم (2 : 173) ـ

[He hath forbidden you only carrion, and blood, and swine flesh, and that which hath been immolated (in the name of) any other than Allah. But he who is driven by necessity, neither craving nor transgressing, it is no sin for him. Lo ! Allah is Forgiving, Merciful.]

(4) A thing permitted on account of an excuse (عذر) becomes unlawful on the cessation of the excuse. For example, a minor is not liable until he attains the age of majority. In other words, when he is major, the excuse of minority is not available to him. The Qur'an says :

و ابتلوا الیتمی حتی اذا بلغوا النکاح فان آنستم منهم رشدا فادفعوا الیهم اموالهم (4 : 6) ـ

[Prove orphans till they reach the marriageable age : if ye find them of sound judgment, deliver over unto them their fortune.]

Chapter 11

BRIEF HISTORY OF THE COMPILATION OF *SUNNAH*

It is true that during the days of the Companions, *Ahadith* were not collected in the form of a book. But it does not mean that there was absolutely no effort to collect and protect *Ahadith* during the time of the Holy Prophet. In fact, the Holy Prophet himself ordered some of his Companions to write *Ahadith*. There is a tradition in "كتاب العلم," pp. 513, 514, Vol. II of *Sunnah* of Abu Dawud (ابو داؤد) which refers explicitly to the writing of *Ahadith*.

The First Period. The Time of the Holy Prophet

During the Holy Prophet's regime a valuable collection of *Ahadith* was present. Some of the احادیث were dictated by the Holy Prophet to the Companions while other precepts were written by them on their own accord. The orders (فرامین), letters (مکتوبات) and treaties (معاہدات) are important parts of this collection.

The Prophet ordered the Companions to write on سنتی, i.e., Prayer, *Zakat*, Fast and *Hajj*. If we study the narrations (روایات), it becomes clear that these documents are very comprehensive and are superb piece of literature. Their list is given below :

1 - خون بہا کی شرح
2 - کتاب سعد بن عبادہ
3 - خطبۂ فتح مکہ
4 - نوشتہ ہائے احکام
5 - صحیفۂ علی
6 - صحیفۂ صادقہ
7 - صحیفۂ سمرہ
8 - کتاب جابر بن عبداللہ
9 - کتاب انس بن مالک
10 - کتاب اسماء بنت عمیس
11 - مختصر تحریریں

The Second Period. From the Death of the Holy Prophet to the End of the First Century Hijri

The Companions and the Learning of Hadith. This was mainly the period of the Companions and their successors (تابعین). The chief aim of the Companions was to follow in the footsteps of the Prophet. They had before them the verses of the Holy Qur'an :

لقد كان لكم فى رسول الله اسوة حسنه (33 : 21) -

اطيعوا الله و اطيعوا الرسول (4 : 59) -

As all of them did not know all the phases of the Prophet's life, so they used to ask one another about the sayings and the precepts of the Prophet and acted upon them. They travelled a long way in search of *Ahadith*.

The Companions not only learnt احادیث by heart but also compiled and protected them. They had already the writings of the Prophet's traditions, so they made a valuable addition to this collection. The narrations of the following Companions came into being :

1 - حضرت ابوہریرہ
2 - حضرت عبداللہ بن عباس
3 - حضرت عبداللہ بن عمر
4 - حضرت عبداللہ بن مسعود

5 - حضرت زید بن ثابت 6 - حضرت صدیق اکبر

Note. It is said that 'Abdullah b. 'Amr b. 'As used to report *Ahadith* from his note-book (الصادقه).

The Third Period. From 100-150 A.H.

(1) At first due to the lapse of time from the period of the Prophethood it became altogether difficult to compile and learn *Ahadith* by heart.

(2) Secondly, several new kingdoms came under the banner of Islam. The scholars of احادیث were scattered thoughout the Muslim Empire. There was a likelihood of mistakes and negligence due to the increase of اسناد from the Holy Prophet.

(3) Thirdly, the sectarian strife gave impetus to the art of self-made or concocted traditions (موضوع احادیث). The enemies of Islam prepared unreliable traditions (ضعیف احادیث). In order to check this menace and malpractice the method of compilation underwent a change.

The *asnad* (اسناد) were fully scrutinised. The clues of اتصال and انقطاع were discovered. The isolated tradition (خبر واحد) and continuous tradition (خبر متواتر) were differentiated. The foundation of جرح و تعدیل was laid. During this period some eminent jurists like امام اعظم، امام شافعی، امام مالک were born who fixed a strict standard for the authenticity of حدیث. The standard of scrutiny developed. The life-sketches of the narrators (رواة) were also compiled.

The Writing of Hadith. When most of the Companions, learned in *Hadith*, died, the successors feared

that had the *Ahadith* not been compiled, they would have perished. 'Umar b. 'Abd al-'Aziz (99 A.H.) pioneered a campaign to collect *Ahadith*. He was himself a traditionist. Prior to this period most of the data with respect to احادیث was verbal. Abu Bakr b. Muhammad, a *qadi* of Medina, collected traditions under the orders of the Caliph. امام المحدثین محمد بن شہاب الزہری made a hectic research for *Ahadith*. Dr Mustafa Husain Saba'i says :

"تدوین سنت کا سنگ بنیاد رکھنے والے امام زہری ہی ہیں ۔"[1]

This campaign started from Medina and covered its initial stages there. A great number of books on احادیث were written. Amongst them the oldest and the most authentic collection is the موطا of Imam Malik. It was compiled during 130 and 140 Hijri. Besides موطا there are some other books of tradition. The following is the list of some of the compilers.

1 - معمر بن راشد 4 - ابو سلمہ حماد بن دینار
2 - امام اوزاعی 5 - عبداللہ بن مبارک
3 - سفیان ثوری

The Fourth Period. From 150-550 A.H.

During this period the traditionists had to work very hard. They fought against the false reporters of *Ahadith*. Moreover, they had the duty of sifting the traditions. By dint of hard labour they attained perfection in this art. They separated self-made *Ahadith* from the real ones by scrutiny. The science of اسماء الرجال

1. "سنت الرسول," p. 146.

was invented. The life-sketches of 1,50,000 persons were collected. Now it became easier to point out an unreliable *Hadith*. The time of the reports was also ascertained. The scientific rules of criticism were framed. Consequently, classes of traditionists also came into existence. These traditionists collected *Ahadith* from every nook and corner of the Muslim world. They journeyed a long distances for this sacred purpose. There was hardly any traditionist who had not his own compilation. The following are some of the famous compilations :

1 - مسند ابو داؤد طیالسی
2 - مصنف عبدالرزاق
3 - مصنف ابوبکر بن ابی شیبہ
4 - مسند احمد بن حنبل
5 - مسند عبد بن حمید
6 - مسند حارث بن اسامہ
7 - مسند ابوبکر بزاز

In the third century Hijri the campaign of the strict sifting of *Hadith* started. Some of the traditionists determined that they would avoid the collection of unreilable *Ahadiṯh* in their compilations. This campaign was successful with the result that six authentic books were compiled which are called صحاح ستہ. These six books are :

1. *Sahih Bukhari* صحیح بخاری
2. *Sahih Muslim* صحیح مسلم
3. *Sunan Ibn Majah* سنن ابن ماجہ
4. *Sunan Abu Dawud* سنن ابو داؤد
5. *Jami' Tirmidhi* جامع ترمذی
6. *Sunan Nasa'i* سنن نسائی

The Efforts at the Compilation of Ahadith (کتابت حدیث کی تکمیلی جہد)

The idea of the compilers of the later period was to protect every acceptable *Hadith*. The distinguished compilers are :

1 - امام ابو لیلیٰ ، "مسند" -
2 - امام طحطاوی ، "معانی الآثار" -
3 - ابن حبان ، "صحیح" -
4 - طبرانی ، "تین معجم" -
5 - امام دار قطنی ، "سنن" -
6 - امام حاکم ، "مستدرک" -
7 - امام بیہقی ، "سنن کبریٰ" -
8 - دیلمی -
9 - ابن خزیمہ -

To sum up :

"حدیث و سنت کا معاملہ قران سے مختلف تھا - اگرچہ اس کے مصدر تشریع ہونے کی حیثیت مسلم تھی، لیکن اس کی باضابطہ تدوین اس طریقے سے نہیں کی گئی جس طرح قرآن کی ہوئی - اس کی وجہ یہ تھی کہ حدیث کا مواد قران کی طرح مختصر نہیں تھا - اقوال ، اعمال اور معاملات کا یہ عظیم الشان ذخیرہ ایک نبی کی جامع اور ہمہ گیر تیئیس سالہ حیات سے تعلق رکھتا تھا - - - - اگر اس پورے مواد کی باقاعدہ تدوین بھی قرآن کے ساتھ ساتھ کی جاتی تو لازماً صحابہ کو قرآن کے علاوہ سنت کی محافظت کے لیے بھی اپنے حافظے پر شدید بوجھ ڈالنا پڑتا اور اس بار کا ناقابل برداشت ہونا ظاہر ہے - پھر اس کے علاوہ یہ بھی خدشہ تھا کہ کہیں بلا ارادہ جامع اور مختصر کلمات نبوی اور آیات قرآن خلط ملط نہ ہو جائیں" -[2]

2. Dr Sh. Mustafa Hasan al-Saba'i, "سنت رسول," pp. 41-42.

Chapter 12

THE SOCIOLOGICAL SIGNIFICANCE OF MAKING THE *SUNNAH* AS THE SECOND BASIC SOURCE OF ISLAMIC LAW

What is Sociology? Sociology is the study of man in society. The lawyer is concerned with the rules that men are expected to observe, i.e. ought to observe. He is concerned with the rules as such, whereas the sociologist is much more interested in actual behaviour than in views as to desirable behaviour, and thus his chief concern is not the rules themselves but the extent to which the rules fulfil their purpose and human consequences of the working of the machinery.[1]

The lawyer thinks that the laws are got to be observed. They are made to be observed; whereas a sociologist looks towards social factors which induce a man for the non-observance of the rules and studies the behaviour of the society. Again, there comes the behaviour of the society towards law, i.e. how it behaves towards law. Laws are for the maximum benefit of the society, e.g. مصالح مرسل (public good). Customs and usages (عرف) are made by the society and not by the sovereign power. Whenever a situation arose and the law was not traceable in the Qur'an,

1. Salmond, *On Jurisprudence*, p. 15.

Sunnah was resorted to. The *Sunnah* was applied to that case which sprang up from the society, e.g. marriage and dower, etc. The Holy Prophet did not abolish customs altogether. Only those customs were eliminated which were contrary to the Qur'an and *Sunnah*. *Sunnah* fulfilled the purpose of the society in view of its changing needs. Consequently, the law remains fresh and capable of development. Mr Ahmad Hasan says:

> "In the context of Islamic jurisprudence ***Sunnah*** refers to the model behaviour of the Prophet. Since the Qur'an enjoins upon the Muslims to follow the conduct of the Prophet, which is distinguished as exemplary and great and becomes ideal for the Muslim community."[2]

By virtue of his conduct the Prophet reformed the society. Then giving it the name of an Islamic State, he showed how a complete and perfect civilisation could be based on Islamic principles. The entire work performed during the span of twenty-two years of his Prophetic life is *Sunnah*. When it is supplemented with the Holy Qur'an it moulds and perfects the Islamic law.

It is the blessing of *Sunnah* that the social, economic, legal and political problems of the Muslim society find their solution in it. Short of *Sunnah*, it becomes difficult to decide the complicated and intricate cases of modern society. That is why *Sunnah* is accepted as the second basic source of the Islamic law unanimously.

2. *The Early Development of Islamic Jurisprudence*, p. 48.

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Chapter 13

THE LEGISLATIVE FUNCTIONS OF THE *SUNNAH*

God has given legislative powers to the Holy Prophet. The Qur'an says :

يامرهم بالمعروف و ينهم عن المنكر و يحل لهم الطيبت و يحرم عليهم الخبئث و يضع عنهم اصرهم والاغلل التى كانت عليهم (7 : 157)-

[He will enjoin on them that which is right and forbid them that which is wrong. He will make lawful for them all good things and prohibit for them only the foul : and he will relieve them of their burden and the fetters that they used to wear.]

In view of this verse, تحليل و تحريم و امر و نہی are not only those which are stated in the Qur'an, but they are also those which are allowed and prohibited by the Holy Prophet. This is due to the delegated powers of Allah to the Prophet. That is why *Sunnah* is a part of God's legislation. Mr Ahmad Hasan says :

"Although the actions of the community were governed by the Qur'an, it was the Prophet who gave its injunctions a practical shape and concrete form. Thus the way in which the Prophet acted upon the Qur'an became the law of the community."[1]

The Companions followed in the footprints of the Prophet. They knew that the life of the Holy Prophet

1. *The Early Development of Islamic Jurisprudence*, pp. 88-89.

is in fact the practical interpretation of the Qur'an as reported by ام المومنين عائشه : كان خلقه القرآن. "During the time of the Prophet," says Mr Ahmad Hasan :

"*Sunnah* implied conformity of the acts of the Companions to the acts of the Prophet. They regulated their lives according to the Qur'an as exemplified in and illustrated by the behaviour of the Prophet. No separate law was needed to support the veracity of their actions except the Prophet. That is why we do not find, during the time of the first four Caliphs, the chaotic state of affairs in law that development with the free transmission of *Hadith* later on."[2]

This is an admitted fact that obedience to the Holy Prophet is obligatory upon the Muslims. It is a part of every Muslim's faith that his salvation depends on the submission to the orders of the Prophet.

"خدا تعالیٰ فرماتا ہے : پیغمبر جو تم کو بتائے اس کی تعمیل کرو اور جس سے منع کرے اس سے باز آؤ - ما اتكم الرسول فخذوه و ما نهكم عنه فانتهوا [59 : 7] - ایسے امور میں سے ایک حصہ علوم معاد اور عالم ملکوت کے عجیب عجیب حالات کا ہے - یہ سب امور بواسطہ وحی کے ہی ہوا کرتے ہیں - آنحضرت صلی اللہ علیہ وسلم کے اجتہاد کو ان میں کچھ دخل نہیں ہے اور انہی امور میں ایک حصہ احکام شرعی اور عبادات کا وجوہ مذکورہ بالا میں سے کسی نہ کسی وجہ سے منضبط کرنے کا ہے- ان علوم میں سے بعض وحی کے ذریعہ معلوم ہوتے ہیں اور بعض آنحضرت صلی اللہ علیہ وسلم کے اجتہاد سے - لیکن آنحضرت صلی اللہ علیہ وسلم کا اجتہاد بھی وحی کے درجہ میں ہے - خدا تعالیٰ نے آپ کو اس سے محفوظ رکھا تھا کہ آپ کی رائے خطا پر جم سکے - اور ایسا بھی نہیں ہے کہ کسی امر منصوص سے حکم منضبط کر کے اجتہاد کرتے ہوں جیسا لوگ

2. Ibid., pp. 91-92.

گمان کرتے ہیں بلکہ اکثر یہ حالت تھی کہ خدا تعالیٰ نے آپ کو شرع کے مقاصد اور وہ قانون تعلیم کیا تھا جس سے حکم شرعی یا آسانی کا طریقہ یا کسی امر کو مستحکم اس سے کر سکتے تھے۔ اس قانون سے آپ ان مقاصد کی توضیح فرما دیا کرتے تھے جو بذریعہ وحی آپ کو حاصل ہوتے رہتے تھے۔"[3]

The gist of the above-quoted verse of the Qur'an is that امر و نہی and تحلیل و تحریم are declared as the acts or the practice (سنت) of the Prophet and not of the Qur'an.

Dr Sh. Mustafa Hasan Sab'ai says :

"فقہا کی اصطلاح میں سنت اس طریقے کو کہتے ہیں جو فرض اور واجب تو نہ ہو مگر نبی سے ثابت ہو۔ اس لحاظ سے یہ فقط ایک طرف فرض اور واجب کے مقابلہ میں بولا جاتا ہے اور دوسری طرف بدعت کے مقابلہ میں۔ مثلاً طلاق کے ثابت شدہ طریقے کو طلاق السنہ کہا جاتا ہے اور غیر ثابت طریقے کو طلاق البدعہ کا نام دیا جاتا ہے۔"[4]

Mr Sobhi Mahmasani says :

"قران کے بعد سنت اسلامی قانون سازی کا دوسرا ماخذ شمار ہوتی ہے گویا وہ قرآن کی تفسیر ہے اور اس کی مجمل آیات کی تشریح کرتی ہے۔ نیز قرآن کے قواعد کلیہ کا مفہوم واضح کرتی ہے۔ سنت تمام مذاہب اسلامی کے نزدیک واجب العمل ہے۔"[5]

Imam Abu Yusuf holds that a decision should be based on the *Sunnah* of the Prophet and practice of the early generation (سلف), i.e. his Companions and those who have understanding in law.

This is rule of legislation that an authority who has the power of law-making can also delegate his

3. Shah Waliyullah, "حجة الله البالغه," p. 231.
4. "سنت رسول," p. 21. 5 "فلسفۂ شریعت اسلام," p. 168.

powers to some person or institution to frame the by-laws or rules for the smooth running of the procedural law. The by-laws are not separate from the actual law but are the part and parcel of that law. These by-laws complete the real law. It is absurd to think that the maker of law formulated a defective and incomplete law by mistake and another person perfected and rectified it. The exact position is that the basic part of the law is granted by the law-giver and its explanatory part is provided by his deputed person or some institution.

God has adopted the same method in His law-making. The Qur'an is a Book of Principles (اصول, کلیات) in which details are very few. Under these circumstances the explanation of the Qur'anic principles becomes necessary. That is why the interpretation (either by word or conduct) is also included in the duties of the Holy Prophet (فرائض نبوت). The Qur'an hinted at it thus :

و یعلمهم الکتاب والحکمه (2 : 129) ۔

[And teacheth them the Scripture and Wisdom.]

و انزلنا الیک الذکر لتبین للناس ما نزل الیهم (16 : 44) ۔

In the light of this explicit verse it can be safely said that *Sunnah* is not something separate from the Qur'anic laws. As a matter of fact, it is a part of the law according to the Holy Qur'an. To challenge its validity amounts to challenge the Qur'an and God's order of delegation. In this context Shah Waliyullah says :

"نبی کریم صلی اللہ علیہ وسلم سے شریعت حاصل کرنے کے دو طریقے ہیں ۔ ان میں سے ایک طریقہ ظاہر قول سے حکم حاصل کرنا ہے ۔ اس کے لیے اقوال نبوی کی نقل ضروری ہے ، خواہ یہ نقل متواتر ہو یا غیر متواتر ۔ دوسرا طریقہ احادیث کی دلالت اور رہنمائی سے احکام شریعت اخذ کرنا ہے ۔ اس کی صورت یہ ہے کہ صحابہ کرام نے رسول صلی اللہ علیہ وسلم کو کوئی حکم دیتے ہوئے یا کرتے ہوئے دیکھا اور آنھوں نے اس سے وجوب وغیرہ کا کوئی حکم مستنبط کر کے لوگوں کو بتایا کہ فلاں شے واجب ہے اور فلاں شے جائز ہے ۔ پھر تابعین نے یہ احکام صحابہ کرام سے اس طرح حاصل کیے ۔ پھر تیسرے طبقے کے لوگوں نے ان کے فتووں کو اور فیصلوں کو جمع فرمایا اس طرح ان احکام کو مستحکم کیا ۔ اس طرح احکام شریعت اخذ کرنے والوں میں بڑے پایہ کے لوگ حضرت عمر ، حضرت علی ، حضرت عبداللہ بن مسعود اور حضرت عبداللہ بن عباس ہیں ۔ حضرت عمر کا یہ دستور تھا کہ وہ ہر مسئلے میں دوسروں سے مشورہ لیتے اور بحث کرتے حتی کہ اس حکم کی حقیقت ظاہر ہو جاتی اور آپ کو یقینی بات معلوم ہو جاتی ۔"[6]

It seems proper to give some examples of this nature of legislative work. The Qur'an says :

واللہ یحب المطھرین (9 : 108) ۔

[Allah loveth the purifiers.]

وثیابک فطھر (74 : 4) ۔

[Thy rainment purify.]

The Holy Prophet, acting according to the intention of these verses, gives detailed directions about purity and ablution (طہارت و استنجا) by his *Sunnah*.

In the Qur'an, Allah has clarified some of the حرام و حلال in case of eatables and for the rest a general injunction is there (کلوا من طیبات ما رزقنکم). The

6. Op. cit., pp. 237-38.

Holy Prophet mentioned the detail of حرام and حلال things.

The Qur'an forbids the *Nikah* of two real sisters by a man at the same time :

و ان تجمعوا بین الاختبین الا ما قد سلف (4 : 23) ۔

[(And it is forbidden unto thee) that ye should have two sisters together, except what already happened (of that nature).]

The Holy Prophet included aunt and niece (پھوپھی و بھتیجی ، خالہ و بھانجی) also under this command. The reason is explained in the words of this *Hadith*.

فانکم اذا فعلتم ذلک قطعتم ارحامکم ۔

[اس لیے کہ اگر تم نے ایسا کیا تو قطع رحم کے مرتکب ہو گے ۔]

This is *Qiyas*, and قطع رحم is the effective cause or علت in it.

Chapter 14

THE *SUNNAH* AND THE ORIENTALISTS

Under this topic we shall try to answer the objections of منکرین حدیث. Their main plea is that the Holy Prophet prohibited the writing of *Hadith*. They produce a *hadith* from صحیح مسلم that :

لا تکتبوا عنی و من کتب عنی غیرالقرآن فلیمحه -

[میری باتیں نہ لکھو اور جس شخص نے قرآن کے علاوہ میری اور باتیں لکھی ہوں وہ انہیں مٹا دے -]

The above *hadith* is incomplete. The opponent omit its later part which says :

و حد ثوا عنی و لا حرج -

[اور اگر میری طرف سے حدیث بیان کرو تو اس میں کچھ مضائقہ نہیں -]

Mr Sobhi Mahmassani writes :

"حضرت عمر بن خطاب نے احادیث جمع کرنے سے اس لیے منع فرمایا کہ کہیں لوگ قبولیت احادیث کے انہاک میں قرآن کو نہ ترک کر دیں -"[1]

The writing of *Hadith* was allowed by the Holy Prophet. We can prove it by another *hadith*[2] where the writing of *hadith* was allowed by the Holy Prophet. If we study both the *ahadith* together, the

1. "فلسفہ شریعت اسلام," p. 165.
2. Abu Dawud, *Sunan*, "Kitab al-'Ilm" II, 513-14.

conclusion is that the writing of *Hadith* or غیر قران was disallowed when it was written along with the Qur'an.

The Arabs were not fond of calligraphy. They depended upon learning everything by heart. The following Tradition clarifies and strengthens our point :

نحن امة امية لا نکتب و لا نحسب (الحدیث) -

[ہم ایک ایسی اُمت ہیں جو لکھنا پڑھنا نہیں جانتی -]

Abu Sa'id Khudri reports that one day the Companions were writing the traditions of the Holy Prophet. In the meantime the Prophet came there. He said : "What are you writing ?" The Companions said : "We are writing your *ahadith*." Then he said : "You are writing another Book with کتاب اللہ (Book of God). Keep this Book pure and don't mix anything with it." On hearing this the Companions burnt all those writings. From the above *hadith* it is quite clear that the Companions wrote *ahadith* on the same pages where they wrote the Qur'anic texts. That is why the Prophet ordered them to keep it unadulterated and separate. In fact, this order does not negate the writing of *Hadith*. The main reason of this order was the thought that the simultaneous compilation of the Qur'an and *Hadith* would create confusion. We can quote *ahadith* from مسند امام احمد بن حنبل in which the Prophet permitted a Companion to write *Hadith*. The Quraish said to 'Abdullah b. 'Amr b. 'As (عبداللہ بن عمرو بن عاص) : "You write each and every

statement of your Prophet. He is a man (بشر). He has his temper and mood." On hearing this the Holy Prophet said :

آکتب فوالذی نفسی بیده ما خرج منی الا حق ۔

[لکھ لو پس مجھے اس ذات کی قسم ہے جس کے قبضۂ قدرت میں میری جان ہے کہ میرے منہ سے حق کے سوا کوئی بات نہیں نکلتی ۔]

گفتۂ گفتۂ او اللہ بود گر چہ از حلقوم عبداللہ بود

There are several other *ahadith* in which the permission of writing was granted by the Prophet.

Dr Mustafa Hasan Saba'i says :

"ہماری تحقیق اس بارے میں یہ ہے کہ جس چیز سے منع فرمایا گیا تھا وہ قرآن کی طرح حدیث یا باقاعدہ و باضابطہ تدوین تھی ۔ باقی ذاتی یادداشتوں کی ممانعت نہیں کی گئی تھی اور خاص حالات و ضروریات میں اس کی اجازت تھی ۔"[3]

The Orientalists claim that *Sunnah* in Islam is really the *Sunnah* of the pre-Islamic Arabia as it stood modified by the Holy Qur'an. Moreover, the concept of *Sunnah* of the Prophet is a late concept because by *Sunnah* the early Muslims consider the practice of the Muslims themselves. It is evident that the concept of *Sunnah* has its origin to the days of the Holy Prophet. It is obligatory on the Muslims to obey Allah and obey the Prophet.

اطیعوا اللہ و اطیعوا الرسول (4 : 59) ۔

They are also directed to observe the model behaviour of the Prophet in this verse :

3. "سنت رسول," p. 45.

لقد کان لکم فی رسول اللہ اسوۃ حسنہ (21 : 33) ۔

[Verily in the messenger of Allah ye have a good example.]

The Arabs accepted the *Sunnah* on the basis of the verses of the Qur'an. They did not observe it as it was present among the Arabs before Islam. The *Sunnah* of the pre-Islamic Arabia has no match with the exemplary conduct (اسوۂ حسنہ) of the Prophet. Mr Ahmad Hasan says :

"No doubt, most of the customs in pre-Islamic Arabia remained in the post-Islamic era after the Prophet had reformed some and introduced others afresh. But by this very reason even the pre-Islamic customs retained in Islam bear the hallmark of the Prophetic sanction. Thus, they ceased to be mere customs of pre-Islamic days."[4]

The answer to the second objection is that the Muslims were governed by the injunctions of the Qur'an as interpreted by the Holy Prophet. In this way the *Sunnah* of the Prophet became the law of the *Ummah* (امت). So the concept of the *Sunnah* of the Prophet is not a late concept. It is not an after thought but existed since the advent of Islam.

Another reason for the rejection of *ahadith* by the Orientalists, like Mr Schacht, is their belief that the term سنت الرسول (*Sunnah* of the Prophet) is very rarely used in the early Islamic literature. This charge is levelled against Islam due to their biased mind. If they ever study the biography of the Prophet by Ibn Hisham (ابن ہشام) (d. 218 A.H.), they can find that in حجۃ الوداع Ibn Hisham records the words : "The Book

4. *The Early Development of Islamic Jurisprudence*, p. 88.

of Allah" (کتاب اللہ) and the *Sunnah* of His Prophet (سنت الرسول). In *Kitab al-Kharaj*, Imam Abu Yusuf writes that 'Umar, the second Caliph, sent his men to different towns in order to teach them دین and the سنت.

Prof. Schacht put forward another charge that "*Sunnah* in its Islamic context originally had a political rather than a legal connotation ; it referred to the policy and administration of the Caliphs". He believes that the term *Sunnah* of the Prophet was first used by the Khariji leader عبداللہ بن عباد and then in a theological significance in the letter of al-Hasan of Basrah addressed to عبدالملک. Again, he observes that this term was introduced into Islamic law towards the end of the first century Hijri by the Iraqis. The main cause of Prof. Schacht's doubts is his lack of the Qur'anic study. The Qur'an makes it obligatory upon the Muslims to follow in the footsteps of the Holy Prophet. His اسوۂ حسنہ is a model for them in all spheres of life. Abu Bakr, the first Caliph, referred to this term in legal context (موطا). It is misleading to assume that the Muslims ignored the *Sunnah* (conduct) of the Prophet in their legal affairs for one century. Mr Ahmad Hasan says:

"Hence, precautionary measures were adopted by the first four Caliphs to keep the practice intact at least in the legal sphere. Any report given by a Companion was put to severe tests, in case it disagreed with the practice."[5]

Prof. Schacht's next charge is that *Hadith* came

5. Ibid., pp. 92-93.

to be forged on a large scale so much so that there is hardly any *hadith* which may be genuinely traced from the Prophet himself. This objection amounts to the rejection of the whole body of *Hadith* which is even genuine. With the fabrication of *Ḥadith* by false narrators it should not be presumed that every *hadith* is موضوع. Mr Sobhi Mahmassani has refuted this charge thus :

"لیکن یہ ضروری نہیں کہ اس کذب و افترا کا یہ مطلب لیا جائے کہ ہر حدیث کو موضوع تصور کیا جائے تا وقتیکہ اس کے صحیح ہونے کی کوئی دلیل موجود نہ ہو جیسا کہ مستشرقین کا خیال ہے ۔ البتہ جس چیز کا تجزیہ ضروری ہے وہ یہ ہے کہ اصطلاح حدیث کے علما نے ایسی احادیث کو اختیار نہیں کیا جن میں ضعف ہو بلکہ انھوں نے تو راویوں کے پرکھنے اور ان کا سلسلۂ روایت ، حافظہ اور ثقاہت معلوم کرنے کے لیے ایسا صحیح اور عملی معیار قائم کر دیا ہے جو قابل وثوق طریقے سے ان کے اصلی حالات معلوم کرنے میں بالکل صحیح رہنمائی کرتا ہے ۔"[6]

From the early days of Islam some persons had doubts in their minds with respect to *Sunnah*. In the modern age some Orientalists also created doubts in the minds of the innocent Muslims. The main reason for their false propaganda was to lessen the importance of *Sunnah* and disturb the cohesion among the Muslims.

The obedience of *Sunnah* is obligatory on the Muslims both in the lifetime of the Prophet as well as after his death. Dr Mustafa Hasan Sabā'i says :

"اوامر قرآن کے بموجب جس طرح اتباع و اطاعت رسول آپ کی زندگی میں واجب تھی بالکل اس طرح سنت کا اتباع مسلمانوں کے لیے آپ کی وفات

6. Op. cit., p. 175.

کے بعد بھی لازم ہے ، کیونکہ نصوص قرآنی نے جس چیز کو واجب ٹھہرایا ہے وہ عام اطاعت ہے۔ ان میں یہ قید نہیں ہے کہ اسوۂ نبی صرف نبی کی زندگی تک مستحق اطاعت ہے اور نہ یہ کہ اطاعت کا حکم صحابہ کے لیے خاص ہے ۔ اطاعت کی علت جیسی اس وقت موجود تھی بالکل ویسی ہی آج بھی موجود ہے ۔"[7]

The Philosophy of Ijma'

The Qur'an suggests consultation in deciding cases, e.g. امرہم شوریٰ بینھم [Their method is consultation amomg themselves (The Qur'an, 42 : 38)]. Thus, besides the Holy Qur'an and *Hadith*, there is a third source of Islamic law named اجاع or consensus of opinion of the learned. By *Ijma'* there is a possibility of arriving at an agreement which consequently becomes the verdict of the community (اجاع الامت). The Prophet said :

لن یجمع أمتی علی الضلالة ۔

[My Community will not agree on error.]

A valid *Ijma'* is a guarantee of an authentic law because the (protecting) hand of God is over the entire body: ید اللہ علی الجاعة (Tirmidhi). So it is by virtue of اجاع that the divergent opinions may be united. That is why the term "اہل سنت والجاعت" is used because they follow the *Sunnah* of the Prophet and decision of the community by its learned.

Although the capability of one's forming a private opinion is of a higher standard, yet there is a possibility of defect in it. Sometimes a *Mujtahid* is

7. Op. cit., p. 33.

unable to examine all the aspects of a problem. On the other hand, when a majority of learned (jurists) arrive at a conclusion after consultation among themselves, its authenticity is ensured. In لن یجمع أمتی علی الضلالة, the *Ummah* means راسخین فی العلم i.e. those learned persons who can interpret the Qur'an and *Sunnah*. Such people cannot agree on something which is wrong.

Any law which is not explicitly available in the Qur'an and *Ḥadith* must be deduced from these two sources by analogy. As only the learned are capable of deducing (استخراج) the law from these primary sources, so their agreed opinion on a particular question of law must be valid, authentic and infallible. Mr Abdur Rahim says :

"The reason why unanimity is insisted on for *Ijma'* in the absolute form is thus stated : every jurist individually is liable to err and the texts, it is urged, raise a presumption of infallibility only in favour of the entire body. The jurists, who hold that the opinion of the majority is sufficient for the purposes of absolute *Ijma'*, interpret the texts in question as meaning most and not all. They contend that if it were otherwise, the doctrine would be practically impossible of realization."[8]

If *Qiyas* is termed as *Ijtihad*, then *Ijma'* may be called as consultative *Ijtihad* (شوریٰ اجتہاد). *Ijma'* or شوریٰ اجتہاد was acted upon during the time of the Rightly-Guided Caliphs (خلفائے راشدین). 'Umar, the second Caliphs, used to summon two types of مجالس شوریٰ, i.e. شوریٰ خاص and شوریٰ عام. The former consisted of the eminent Companions of the Holy

8. *The Principles of Mohammadan Jurisprudence*, p. 124.

Prophet. This body advised the Caliph on every administrative affair of the State. In the latter the people of Medina assembled in the Mosque of the Prophet (مسجد نبوی). When there arose any important question which had no solution in the کتاب و سنت, then the Caliph put that question before the assembly of the people and consulted them. Its practical example may be cited when the Caliph 'Umar decided the distribution of the Iraqi land. At first he consulted شوریٰ خاص. When it could not give a satisfactory decision, شوریٰ عام was summoned. This big assembly remained in session for three days. Consequently, it was decided that the Iraqi land should not be distributed among the soldiers, because the future generations also have the right of benefit out of it. Mr Ahmad Hasan says :

> "*Ijma'* is a principle for guaranteeing the veracity of the new legal content that emerges as a result of exercising *Qiyas* and *Ijtihad*. It is, in fact, a check against the fallibility of *Qiyas*."[9]

Islam respects the private opinion (رائے), but at the same time it is aware of its limitations. Mr Ahmad Hasan opines :

> "The *Ijma'* of the learned is not the name of the decisions on legal issues taken by our assembly of Muslim jurists. It emerges, in fact, by itself through a process of intepretation, and creates for itself a position in the community."[10]

This idea is also endorsed by ابو زہرہ. He says :

"نصوص کے بعد اجماع کو حجت تسلیم کرنا آرائے ملت میں وحدت

9. Op. cit., pp. 54-55. 10 Ibid.

پیدا کرنے کی غرض سے ہے تا کہ شاذ اور منفرد آرا پر عمل سے روکا جا سکے۔"[11]

Imam Shafi'i holds that *Ijma'* is something static. He abhors disagreement. That is why he is reluctant to accept the *Ijma'* of the learned because of their disagreement. He is in favour of the *Ijma'* of the *Ummah*. He believes that the community adheres to the *Sunnah* of the Prophet, but the individuals may ignore it. Again, he argues that the community can never agree on a decision contrary to the *Sunnah* of the Holy Prophet, nor on an error.[12]

The law laid down by *Ijma'* is authoritative and binding. It guarantees authenticity and validity. It is not possible for the jurists in a particular age to agree on a wrong decision. So the question of law deduced by means of *Ijma'* is correct and reliable. It eliminates chaos in law and harmonises the procedure of law-making. Imam Malik reported the following *hadith* from 'Ali :

"میں نے عرض کیا ، یا رسول اللہ (صلی اللہ علیہ و آلہ وسلم) اگر ہمارے سامنے کوئی ایسا واقعہ پیش آئے جس کے متعلق نہ قرآن میں حکم ہو اور نہ آپ کی کوئی سنت موجود ہو تو اس وقت کیا کیا جائے؟ آپ نے فرمایا : مومنوں میں سے اہل علم جمع کرو اور آپس میں مشورہ کرو اور ایک شخص کی رائے پر فیصلہ نہ کرو ۔"

Ijma' is a natural process of solving the problems and adjudicating upon them. This conception came into being as a socio-political necessity. It has the Qur'an and *Ḥadith* to its backing. After the death

11. "ابو حنیفہ," p. 529. 12. Shafi'i, *Risalah*, p 66.

of the Holy Prophet the Muslims made use of this principle to solve the most intricate constitutional problem of خلافت at سقیفہ بنی ساعدہ. The people elected Abu Bakr to Caliphate on the basis of *Ijma'*. In like manner personal opinions of 'Umar, the second Caliph, in connection with legal problems were accepted later as *Ijma'* of the community. Mr Ahmad Hasan says :

"Thus, *Ijma'* begins with the personal judgment of individuals (or *Ijtihad*) and culminates in universal acceptance of a certain opinion by the community in the long run. *Ijma'* emerges by itself and is not imposed upon the *Ummah*."[13]

The chief aim of *Ijma'* is to unite the divergent opinions of the jurists on a problem. Moreover, it ascertains the veracity of a private judgment. Snouck Hurgronje says :

"The consensus guarantees the authenticity and correct interpretation of the Koran, the faithful transmission of *Sunnah* of the Prophet, the legitimate use of analogy and its results; it covers, in short, every detail of the law, including the recognized differences of the several schools."[14]

The reason for the difference among scholars is the exercise of personal opinion, with the result that divergent opinions are given on the same case at the same time. In order to rectify this lacuna the principle of *Ijma'* was introduced. Mr Ahmad Hasan says :

"In order to check this chaotic state of affairs and to protect the *Ummah* from disintegration, the institution of *Ijma'*

13. Op. cit , p. 157.

14. Ibid , pp. 160-61.

was introduced. Leaving aside the stray opinions, the average general opinion of each locality was taken as the local *Ijma'*."[15]

European scholars vehemently attacked the institution of *Ijma'*. We enumerate some of their opinions. They think that *Ijma'* is an established fact in Islamic law which does not necessitate meditation and personal reasoning. Moreover, they hold that *Ijma'* is a consensus of the general public. This consensus affects the tenets and the practical aspect of life. If it is contrary to the Qur'an and *Sunnah*, even then it will be preferred. So much so that *Ijma'* has changed the very tenets of the Muslims. In addition to it, some innovations (بدعات) came into existence in the early days of Islam. The innovations have attained the force of *Ijma'*. All these charges are absolutely baseless. Abu Zahrah says :

"علمائے یورپ نے یہ تک کہ دیا ہے کہ اجماع کے بعد بدعات بھی سنت ثابتہ کی حیثیت حاصل کر لیتی ہیں ۔ یہ اسلام پر ناروا حملہ ہے کیونکہ کسی بدعت کے لیے اجماع کا سوال ہی پیدا نہیں ہوتا اور بدعت پر کتنی بڑی اکثریت عمل پیرا کیوں نہ ہو وہ بہر حال ضلالت ہے ۔ چنانچہ آنحضرت کا فرمان ہے :

"کل بدعة ضلالة و کل ضلالة فی النار ۔"[16]

15. Ibid., p. 23.

16. Op. cit., p. 525.

Chapter 15

THE PARALLEL CONCEPT OF *IJMA'* IN THE WESTERN SOCIETY

In Islamic law sovereignty lies in God Who is the Creator of the Universe. Mr H.K. Sherwani says :

"The Qur'an is a mine of precepts about the unity of Godhead and the sovereignty of God on earth."[1]

Some of the Qur'anic verses are as follows :

قل اللهم ملک الملک تؤتی الملک من تشاء و تنزع الملک ممن تشاء و تعز من تشاء و تذل من تشاء بیدک الخیر انک علیٰ کل شیٔ قدیر - (26 : 3)

[Say, O Allah! Owner of Sovereignty! Thou givest sovereignty unto whom Thou wilt, and thou withdrawest sovereignty from whom Thou wilt. Thou exaltest whom Thou wilt, and Thou abasest whom Thou wilt. In Thy hand is the good. Lo! Thou art Able to do all things.]

Unto Allah belongeth the sovereignty of the heavens and the earth. Allah is able to do all things :

لله ما فی السموات و ما فی الارض (2 : 284) -

[Unto Allah (belongeth) whatsoever is in the heavens and earth.]

God is the ruler of the world. His law is supreme, while man is His vicegerent :

1. *Studies in Muslim Political Thought and Administration*, p. 23.

و یجعلکم خلفاء الارض (27 : 62) -

[اور تم کو زمین میں جانشین بناتا ہے -]

On the other hand, in the Western society sovereignty lies in the people. Their notion is that people are Supreme. Unlike the Western world, God is the Supreme Legislator. The primary sources of Islamic law are the Qur'an and *Ḥadith*. But the subsequent development of law through *Ijma'* and *Qiyas* is, however, based on these two basic sources which are in fact the revealed laws. As stated above, the legislative power vests in God and the people are His representatives in the Universe.

The concept of sovereignty is the very basis of modern political science. Woodrow Wilson has called it "the daily operative power of framing and giving efficacy to the laws".

Ijma' is the third source of the Islamic law. It is an agreement of jurists among the followers of Muhammad (peace be upon him) in a particular age on a question of law. No such exact conception exists in the Western society. However, it may be said that their legislative assemblies perform such a consensus of opinion. The function of a legislature depends on the principle on which it is constituted. A king may keep up a legislature merely as a consultative body. But at present the representative legislatures are in vogue. Keeping in view the supremacy of legislature it is to be found in the parliamentary form of Government. The will of the legislature is supreme.

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Such a system of Government prevails in England and France.

The primary function of the legislature is to make the law of the States, to repeal laws which are not suited to the time and to make them conform to the needs of time.

The principle of parliamentary sovereignty, says Mr A.V. Dicey:

"Means neither more nor less than this, namely, the Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[2]

Ijma' *and the Roman Concept of* Opinio Prudentium

According to Wharton's *Law Laxicon*, the term "*Responsa Prudentium*" or "*Opinio Prudentium*" means the opinions and decisions of lawyers, forming part of the Roman law. Those were the answers or opinions of the recognised jurists. In the Roman law the jurisconsults were empowered by the Emperor to interpret the law on behalf of the States. My Jhabwala says:

"In their origin they were nothing more than the private opinions of particular lawyers, but after they had been generally adopted by the legal profession, and recognized by the judicial tribunals, they were called *sententioe receptoe* and acquired

2. *Introduction to the Study of the Law of the Constitution*, pp. 39-40.

the authority of law."[3]

Mr Schacht, quoting Goldziher, tries tos how that the concept of the consensus of scholars corresponds to the *opinio prudentium*, i.e. the opinions of the wise. Goldziher has suggested the influence of the Roman law on the Islamic law in this matter.[4] This charge is baseless. In fact, the *Ijma'* of the learned in Islam is quite different from the *opinio prudentium* of the Roman law. The points of difference may be enumerated thus:

Firstly, there is no hierarchy in Islam. In Islam neither the community nor any scholar (عالم) was vested with the authority as was vested by the Romans in the *opinio prudentium*. The '*Ulama*', by virtue of their character and learning in the teachings of Islam, occupy a place of reverence in the *Ummah* (امت). As a class they enjoy no special privilege as their counterpart in the Roman law.

The احبار and رہبان possess a special privilege in Judaism and Christianity, respectively. The '*Ulama*' are not the intermediaries between God and man. They have claimed the right of *Ijma'* for themselves on their own accord. They are not vested with any State authority. Only the Qur'an gives them an allurement for this sacred duty:

فلو لا نفر من كل فرقة منهم طآئفة ليتفقهوا فى الدين (9 : 122) -

[سو ایسا کیوں نہ کیا جائے کہ ان کی ہر بڑی جماعت میں سے ایک

3. *Principles of Roman Law*, pp. 14-15.

4. *The Origins of Muhammadan Jurisprudence*, p. 83.

ایک چھوٹی جماعت (جہاد میں) جایا کرے تاکہ باقی ماندہ لوگ دین کی سمجھ بوجھ حاصل کرتے رہیں ؟]

Secondly, every Muslim who is competent in the interpretation of law has the right to reinterpet law. The decisions taken by jurists can also be reviewed if they are not strictly in accordance with the teachings of the Qur'an and *Sunnah*. Such a right for the interpretation of law and criticising the consensus of scholars is not available in the Roman law. So the decision of the learned can be challenged by any jurist if it is against the tenets of Islam.

Some people confine *Ijma'* to the members of the Prophet's family. This idea is not correct in the light of the Qur'anic injunction which explicitly laid down :

ان اکرمکم عنداللہ اتقکم (49 : 13) -

[The best among people are those who are the most God-fearing.]

So knowledge or piety is not confined to any person or group of persons. Mr Ahmad Hasan says :

"Thus *Ijma'*, in Islam, is an on-going process and a continuous activity, and changes with the changing circumstances. In any case, there is, and there has been, no locatable body in Islam whose opinions can be claimed as *Opinio Prudentium* simply because Islam has set up no such institution."[5]

The *opinio prudentium* in one respect may correspond to the issuing of فتوىٰ by the learned. During

5. *The Early Development of Islamic Jurisprudence*, p. 160.

the initial stages of the Roman State such opinions or فتاوىٰ were issued by the Roman learned whenever the occasion necessitated. Sobhi Mahmassani writes :

"رومی حکومتوں کے ابتدائی دور میں روم کے علمائے قانون کے فتاویٰ ان کے جوابات پر مشتمل تھے جو طالب علموں یا ضرورت مند اشخاص کو دیے جاتے تھے - اور کبھی وہ جوابات ججوں کو دیے جاتے تھے جن کی پابندی ججوں کے لیے ضروری نہ تھی - لیکن شہنشاہ آگسٹس کے عہد میں ان فتووں کی حیثیت بدل گئی کیونکہ آ گسٹس نے ارباب قانون کی ایک جماعت کو قانونی مشورہ دینے کا حق دیا اور یہ فرمان جاری کیا کہ یہ مشورہ جج کے لیے اس مقدمے میں واجب العمل ہو گا جس کے لیے وہ دیا گیا ہو تاوقتیکہ اس جماعت میں سے کوئی دوسرا عالم قانون اس کے خلاف مشورہ نہ دے -"[6]

6. "فلسفۂ شریعت اسلام," p. 233.

Chapter 16

SOCIOLOGICAL ANALYSIS OF THE PHENOMENON OF SOCIAL CHANGE

There are forces that obstruct social change as well as those that foster it. These changes are very significant due to their impact on social life. Sometimes these forces of change lead to the destruction of the established organisations and their functions. Consequently, the forces at work create social problems, for example, unemployment and economic crisis come in the wake of the breakdown of the economic organisation. On the other hand, remedial programms are also at work. The remedy for unemployment is insurance, vocational training and other aids. In a progressive society efforts are made to ease and solve the problems of the social life. The basic idea is how to improve the ills of society.

It is admitted by all that only a limited portion of the social heritage of a country is of indigenous nature. The bulk of this heritage is of foreign origin. The principle of diffusion plays an important role in the growth of social heritage. Those countries which are contiguous are benefited by the cultures of one another. Conversely, the secluded nations have a backward and worn-out culture. The factors that affect culture are geographical situation, natural

resources and status of transportation, etc. Ogburn and Nimkoff say :

"Most of the social heritage of colonial America was brought there from England, Spain and other European countries. Some items of the social heritage, such as potato, maize, types of cooking, and methods of warfare were contributed by the American Indians, though this fact is not generally known. England and France derived much of their culture from Italy. Italy, in turn, borrowed from the Greeks. It was once thought that Greece created her culture, but now it is known that the Greeks borrowed a great deal from Crete, and that Crete got hers, in large part, from Egypt. Egypt has been shown to be greatly indebted for her culture to the valley of the Euphrates. And now connections are being made between the Euphrates and India, and between India and China. Clearly, there has been a vast amount of borrowing of culture by one region from another."[1]

There is no limit to the progress of culture. It remains in the process of making. A new invention depends on a large extent to the previous inventions in the same sphere. In case of manufacturing a modern cannon, a munition expert will carefully examine the previous inventions in the sphere of artillery. In the words of Ogburn and Nimkoff, there is no adequate reason to think that modern man, without the benefit of culture, could acquire this knowledge in any quicker time.[2]

History shows that the higher the rate of inventions, the more the increase in the cultural change. Moreover, the favourableness of the geographical

1. *A Handbook of Sociology*, pp. 523-24.
2. Ibid., p. 520.

situation, say the authors of *A Handbook of Sociology*:

"varies according to the stage of the existing culture. England was better situated for advancement when boats had become large and when America had been discovered, than when the size of boats limited voyages to short distances."[3]

It should be noted, however, that there are certain obstacles to social change. The scarcity of invention is a cause of gradual change in a society. Invention is the pivot of change. The infrequency of invention is due to lack of the necessary knowledge or to a weak social demand.

Sometimes social inventions face opposition. The use of coal was prohibited in England in the reign of Edward I, and a citizen was tried, condemned and executed for burning "Sea Cole". A bill was introduced in the House of Commons at the instance of the British Admiralty forbidding the use of steam power in the British navy.[4]

Early during the rule of British in India inventions like railways, motor cars, telegraphs and telephone met with great resistance and opposition. A new invention may be strongly opposed if an element already exists which serves somewhat the same purpose.

From the psychological viewpoint opposition to changes is a matter of habit formation. There are

3. Ibid., pp. 536-37.

4. Bernhard Stern, *Resistance to the Adoption of Technological Innovation, Technological Trends and National Policy.*

some people who want no change in their everyday working. They are unable to change their habits. It is aptly remarked by someone that habit is not a second nature but ten times nature. There are also other factors that are inimical to social change, such as fear of the new, devotion to things, reverence for conditions of the past and the attitude of vested interests.

The main reason of social change in modern age are mechanical inventions and discoveries. These are the mainstay of our age. That is why it is called a scientific age. Technology is progressing by leaps and bounds. The bullock cart is being replaced by the motor car and aeroplane.

It will be interesting to note the effects of inventions on modern social life. Its pertinent example is the invention of radio and television. Such technical inventions create social influences. Radio and television have become a great power for civilisation. They have brough about a tremendous revolution not only in the field of recreation but also in an effective medium of instruction. They are a great force in combating the evils of illiteracy and ignorance. Much of the progress of our age is due to technical inventions. It is rightly said that social inventions cause social changes, too.

This is a matter of common observation that social change takes place through the medium of ideas. There are two extreme types of ideas, those that centre round facts and material objects, and

those that centre round fantasies.[5] The material culture is influenced to a great extent by the former, while literature, art, religion and social philosophy may conform to the latter or to the combination of the above two types.

Another important aspect is that social disorganisation is caused by rapid and extensive change. An organisation may be defined as an articulation of different parts with various functions to perform. Human body and city life are its excellent examples. The change that disturbs organisation may be quick as in flood, etc., or slow as when a war disorganises the trade of neutrals. Disorganisation is the result of the impact of these forces that produce social change. "The organisation," say Ogburn and Nimkoff, "consists of habits and institutions, among which there is a fair degree of equilibrium. This equilibrium is often shaken by social changes."[6]

At this stage it would be important to consider the causes of social disorganisation. A well-organised society maintains cohesion in its different parts. Its peculiar quality is an adjustment of its different components. When this adjustment is altered, the balance of the parts is disturbed, the society will suffer from lack of co-ordination. Such an imbalance results in social disorganisation.

It is obvious that the progress of science and technology developed our culture, knowledge and

5. Carl G. Jung, *The Psychology of the Unconscious* (London, 1927.)
6. Op. cit., p. 585.

wealth, but it created disorganisation, unrest and discontentment in the society. For instance, with the introduction of machinery in the mills, thousands of those workers are rendered jobless who used to earn their livelihood with their hands.

The role of culture conflict is also one of the causes of social disorganisation. War, or a social invention, can cause as great disorganisation as technological changes. Epidemic, for example, may cause havoc in a community. Social life is disturbed by floods, earthquakes and famines, etc. No doubt, in the modern age the catastrophic phenomena of Nature can be forecast and controlled to a great extent. The extent of the social disorganisation depends on the ability of the existing culture to cope with these natural phenomena.[7]

Discussing sociology, 'Allamah Ibn Khaldun said:

"دنیا کے حالات اور اقوام عالم کی عادات ہمیشہ ایک حالت پر باقی نہیں رہتیں۔ دنیا تغیرات زمانہ اور انقلابات احوال کا نام ہے اور جس طرح یہ تبدیلیاں افراد، ساعات اور شہروں میں ہوتی ہیں اسی طرح دنیا کے تمام گوشوں، تمام زبانوں اور تمام حکومتوں میں واقع ہوتی ہیں۔ خدا کا یہی طریقہ ہے جو اس کے بندوں میں ہمیشہ سے جاری ہے۔"[8]

Factors which Necessitate Change in Law

This is an admitted fact that new manifestations of human activities and behaviour bring about change in law. There are certain socio-economic reasons that are also responsible for its change. Mr

7. Ibid., p. 597.
8. "مقدمہ ابن خلدون," p. 24.

Sobhi Mahmassani says :

"اس میں شک نہیں کہ دنیا کی انقلاب پذیری کا نتیجہ یہ ہے کہ معاشرۂ انسانی کا معیار بدلنے سے لوگوں کی فلاح و بہبود کے معیار بھی بدل جاتے ہیں اور چونکہ بندوں کی بہتری ہی ہر قانون کی بنیاد ہے، لہٰذا عقل کا فتویٰ یہی ہے کہ زمانے اور معاشرے کی تبدیلیوں کے ساتھ ساتھ احکام شرع میں بھی مناسب اور ضروری تبدیلیاں ہوتی رہیں، نیز وہ اپنے گرد و پیش کے اجتماعی حالات سے بھی متاثر ہوتے رہیں۔"[9]

It is evident that law depends on popular acceptance. Every group or society has a living and dynamic law. The duty of a judge is merely to precise and arrange the raw material that is supplied by the people. A community is, in fact, governed by the rules created by its own consent. The codified law comes into action only when some of its provisions are challenged.

For instance, in parts of Austria, the statute law has not greatly affected the real life of the community. It is not essential that law should be created by the State, or applied by the courts, or that there be a system of legal compulsion. The real law consists, not of propositions, but of legal institutions created by the life of the groups within society.[10]

It is difficult to discover how law operates unless we have knowledge of the factors that cause change in society and govern its evolution. The relationship between law and social interests is of vital importance in jurisprudence. In proof of this principle

9. "فلسفۂ شریعت اسلام," p. 242.
10. G.W. Paton. *A Textbook of Jurisprudence*, p. 29.

ابن القیم جوزیہ says :

"احکام کی تبدیلی اور اختلاف زمان و مکان، احوال و نیت اور عادات انسانی کے اختلاف کے ساتھ وابستہ ہے۔"

Mr Sobhi Mahmassani further elucidates this point in the following words :

"آنھوں [ابن قیم] نے اسی واضح حقیقت کی طرف اشارہ کرتے ہوئے کہا ہے کہ معاشرۂ انسانی اور قانون کا باہمی رشتہ نہ جاننے کے باعث لوگوں میں ایک غلط فہمی پیدا ہو گئی ہے جس نے شریعت اسلامی کا دائرہ بالکل محدود کر دیا ہے حالانکہ وہ یہ نہیں سمجھتے کہ جس شریعت میں مصالح انسانی کا سب سے زیادہ لحاظ رکھا گیا ہو اس میں ایسی تنگ نظریوں کی گنجائش نہیں۔"[11]

Nearly the same subject is mentioned in "قواعدالجامع" which is provided in Section 30 of مجلة الاحکام :

"لا ینکر تغیر الاحکام بتغیرالزمان" [یعنی یہ ایک ناقابل انکار حقیقت ہے کہ زمانہ بدلنے سے احکام بھی بدل جاتے ہیں] ۔ اس قاعدے کی تکمیل کے لیے یہ الفاظ اور اضافہ کر دینا چاہییں "و تغیرا لامکنة والاحوال" [یعنی تغیر مکان اور تغیر حالات سے بھی احکام بدل جاتے ہیں] جیسا کہ فقہا نے اس کی تشریح کی ہے۔"[12]

The foundation or root of law is the essential requirements of social life. Law is the outcome of social living. It does not depend upon the will of the ruler. Mr Paton says :

"A determined attempt is now made to teach law as a function of society instead of as a mere abstract set of rules, while the courts are canvassing freely the reasons of social policy which lie behind certain rules of law."[13]

11. Op. cit., p. 243.
12. Ibid., p. 249.
13. Op. cit., p. 32.

The functional jurisprudence cannot work properly without a study of the aims and objects for which society exists.

The basic rules of society differ according to its development. A rule acquires a force of law if it has the support and backing of a community. Legislation does not create law but only points out its actual existence, e.g. infanticide was a rule of law before it was recognised by the State.

The foundation of law depends on the sentiment of solidarity. It hints at a certain rule which is essential to the life of a community. Hence community is a condition precedent to the existence of law. Owing to the growing needs of a society, the lawgiver is constrained to develop law in order to meet the changing needs and the dynamic character of a community. Mr Ahmad Hasan says :

"The Qur'an and the *Sunnah* no doubt provide us with some legal rules with regard to the individual and social life of Muslims. But human life, being dynamic, requires laws that should change with the changing circumstances. *Ra'y* is an instrument that enables the coverage of diverse situations and enables Muslims to make new laws according to their requirements. The period of 'Umar's Caliphate abounds in such instances."[14]

It should be clear in mind that there cannot be a change in Islamic law. We can only put a new construction in line with the Qur'an and *Sunnah*. The doctrine of *Qiyas* must have come into limelight as

14. *The Early Development of Islamic Jurisprudence*, p. 53.

a result of social necessity. Its examples may be studied in the Chapter on *Qiyas*.

Public good (مصالح عامہ) is the foundation of law (احکام شرعیہ). So when the foundation gives way or changes, the law based on it must be changed. It has been remarked in "قواعد اساسی" :

"ان الحکم الشرعی المبنی علی علة یدور مع علته و جودا و علماً"[15] [یعنی جو حکم شرعی کسی سبب پر مبنی ہو وہ اس سبب کے وجود و عدم وجود کے ساتھ وابستہ ہوتا ہے -]

مولانا علائی says :

"ان الحکم الشرعی مبنی علی علته فبانتهائها ینتهی -"[16]

[جو حکم شرعی کسی سبب پر مبنی ہوتا ہے وہ اس سبب کے ختم ہو جانے سے ختم ہو جاتا ہے -]

15. Ibid., p. 53.

16. "المنافع شرح المجامع," p. 319.

Chapter 17

THE STRUCTURE AND THE FUNCTIONS OF THE CONCEPT OF *QIYAS*

Structure. *Qiyas* is the fourth source of the Islamic law. Its root meaning is measuring, accord and equality. It is an opinion of the learned based on an analogy. The main difference between *Ijma'* and *Qiyas* is that *Ijma'* is a consensus of the opinion of the learned, while *Qiyas* is an opinion based on the similitude of circumstances. Mr Sobhi Mahmassani says :

"اصطلاحاً قیاس کی دو قسمیں قرار دی گئی ہیں : ایک قیاس طرد اور دوسری قیاس عکس ۔ قیاس طرد کا مطلب یہ ہے کہ فرع اور اصل دونوں میں یکساں طور پر وہ علت پائی جائے جس کے سبب اصل کے حرام ہونے کا حکم دیا گیا ہے ۔ قیاس عکس کا مفہوم یہ ہے کہ ایک چیز پر ایسا حکم لگایا جائے جو دوسری چیزوں کے حکم سے متناقض ہو اور وہ اس لیے کہ دونوں حکموں کی علتیں مختلف ہیں جیسے ہم کہیں کہ دودھ اس لیے حلال ہے کہ اس میں شراب کی طرح نشہ نہیں ۔ جب قیاس کا لفظ استعمال ہوتا ہے تو عام طور پر قیاس طرد مراد ہوتا ہے ۔"[1]

The following are the constituents of *Qiyas* :

(1) Nass (نص) *or* اصل *or* مقیس علیہ. This is the text either of the Holy Qur'an or the Tradition.

(2) *Branch* (فرع) or مقیس. It is the case in issue to which the law embodied in the text is extended.

1. "فلسفۂ شریعت اسلام," pp. 184-85.

(3) *Law* (حکم), the legal effect established after *Qiyas*.

(4) *Effective Cause* (علت). The fact, circumstance, or consideration which the Lawgiver had had in regard in laying down the law embodied in a text.

The above points are explained with an illustration. Wine is declared حرام according to the Qur'anic text. The effective cause of its حرمت is intoxication. Someone may suppose that نبیذ (wine of dates) is not حرام according to the verse of the Qur'an. But this is a fallacy. As it has سکر or intoxication, so by analogical deduction it is also حرام. In the above example wine is *asl* (اصل), نبیذ is فرع, intoxication is '*illat* and حرمت is law (حکم). In the same manner effective cause or '*illat* is قطع اخوت and محبت in usury (ربوا) and bribe (رشوت).

علامہ شیخ خضری بک says :

"قیاس کی صورت یہ ہے کہ قرآن کریم بعض اوقات ایسے اصول بیان فرماتا ہے جن سے یہ معلوم ہو جاتا ہے کہ جو اس جیسی صورتیں ہوں گی ان کا حکم بھی یہی ہوگا اور جو بات اس کے اطلاق سے سمجھ میں آتی ہے وہ یہ ہوتی ہے کہ بعض مقید صورتیں بھی اسی جیسی ہیں ۔ اس طرح قرآن کریم حدیث کی توضیح پر اعتماد کر کے کوئی اصل بیان فرما دیتا ہے اس کی فروع کو چھوڑ دیتا ہے ۔ یہ مقیس علیہ (اصل) اگرچہ خاص ہوتی ہے لیکن معنی کے لحاظ سے عام ہوتی ہے ۔ ایسی حالت میں اگر ہمیں قرآن میں کوئی اصل ملے اور حدیث میں بھی کوئی اس جیسا حکم آیا ہو تو یہ سمجھنا چاہیے کہ قرآن کی مراد بھی یہی معنی ہیں ۔ خواہ حدیث کو رسول اللہ صلی اللہ علیہ وسلم کا اجتہاد قرار دیا جائے یا وحی ، بہر حال ہمارے خیال میں یہ صورت مقیس اور مقیس علیہ کے قائم مقام ہے ۔"[2]

2. "تاریخ فقہ" (Urdu), p. 45.

For a correct analogical deduction the following conditions are necessary :

(1) The law embodied in the text (either of the Qur'an or the Tradition) to which analogy is to be applied must not have been intended to be confined to a particular state of facts.

(2) The law of the text must not be such that its reason cannot be understood by human intelligence nor it be in the nature of an exception to some general rule.

(3) *Qiyas* may be based on the law established either by a text of the Qur'an or *Ḥadith* or by a unanimous decision of the learned. The rule so deduced must not be contrary to a text law, nor covered by the words of a text.

(4) The deduction must not be such as to involve a change in the law embodied in the text.

It will not be out of place to explain the term *Ra'y* (رائے) in connection with *Qiyas*. The dictionary meaning of *Ra'y* is an opinion or judgment. Prior to *Qiyas*, *Ra'y* played an important role in deducing law. Although *Qiyas* is a systematic form of *Ra'y*, yet there are some points of difference between these two. They may be enumerated thus :

(1) *Ra'y* is flexible in nature. It is a well-considered opinion of a person. *Qiyas*, on the other hand, is an extension of a precedent.

(2) *Ra'y* is wider in its application than *Qiyas*. Due to its limited scope *Qiyas* fails on many occasions.

(3) In *Ra'y* the emphasis is laid on the actual situation, while in *Qiyas* the emphasis is on abstract analogy, irrespective of the situation.

The limited nature of *Qiyas* is illustrated by Ibn al-Muqaffa (ابن المقفی) in these words : "Suppose a man consults you on whether he should speak the truth or tell a lie. You would certainly suggest to him that he should speak the truth. Again, he asks you whether on every occasion, say, when a person wants to kill another, he should speak the truth and give the trail of the fugitive. Here *Qiyas* demands that he must speak the truth, but *Ra'y* advises breaking of the law, i.e. not to speak the truth but to do what is generally beneficial."[3]

Functions of the Concept of Qiyas

Qiyas is a method of deciding a problem by analogical deduction from known to unknown. It discovers law but does not create a new law. Moreover, it widens the application of law embodied in the text. Mr Sobhi Mahmassani says :

"قیاس کو دلیل شرعی قرار دینے میں فقہا نے قاعدۂ شرعی کے اصول سے استدلال کیا ہے کہ شریعت کے تمام احکام مخصوص اغراض و مصالح پر ہیں اور اغراض و مصالح ہی ان احکام کی علت غائی اور ان کے وجود کا سبب ہیں - اس لیے فقہا احکام کے علل و اسباب دریافت کرتے ہیں - چنانچہ جب وہ کسی مسئلے کے متعلق ایسے حکم کی علت غائی دریافت کر لیتے جو نص کی رو سے دیا گیا ہو تو ان کے لیے یہ ممکن ہو جاتا کہ

3. Ahmad Hasan, *The Early Development of Islamic Jurisprudence*, pp. 136-37.

کسی دوسرے مسئلے کو اسی پر قیاس کر سکیں اور اس کو بھی ویسا ہی حکم دے سکیں جیسا پہلے مسئلے کو دیا گیا تھا بشرطیکہ دونوں کی علت غائی ایک ہو۔"[4]

Qiyas is a great contribution to اصول فقہ, because without this source it would be difficult to decide cases of varied nature due to the growth of the social set-up. The situation was anticipated by the Holy Prophet in his dialogue with Mu'adh b. Jabal (معاذ بن جبل). It has acquired the status of حدیث قولی. On appointing him as the Governor of Yemen, the Holy Prophet asked him how he would decide cases brought before him (لم تقضی یا معاذ). He answered : "I shall decide the cases by the Qur'an (بکتاب اللہ)." Then the Holy Prophet asked him if he did not find in the Qur'an a relevant law (فان لم تجد فی کتاب اللہ), he replied: "I shall solve it by the Tradition" (لسنة رسول اللہ)". Again the Holy Prophet asked if he could not find its solution in the *Hadith* (فان لم تجد فی سنة رسول اللہ). On this, معاذ بن جبل said : "Then I shall use my own judgment (اجتهد برائی)." The Holy Prophet agreed and said :

"الحمد اللہ الذی و فق رسول رسول اللہ علیٰ ما یحب و یرضاہ۔"

This was the significant direction which provided necessary justification for the use of *Qiyas*. So *Qiyas*, based on the spirit of the Qur'an and *Ḥadith*, is an authentic law. شاہ ولی اللہ says :

"حضرت عبداللہ بن عباس کا قاعدہ تھا کہ جب ان سے کوئی مسئلہ دریافت کیا جاتا تھا اور اس کا حکم قرآن میں ہوتا تھا تو اس کے موافق فیصلہ

4. "فلسفۂ شریعت اسلام," pp. 183-84.

کرتے تھے۔ اگر قرآن میں اس کا حکم نہ ملتا اور رسول خدا سے اس کا حکم ثابت ہوتا تو وہی بیان کر دیتے اور ان سے بھی کوئی حکم محقق نہ ہوتا تو تب اپنی رائے سے اس کا جواب دیتے۔"[5]

There are two strong reasons for making use of analogy : (1) the growing needs of the society; (2) the expansion of the Islamic territory. The law which, during the lifetime of the Prophet, governed the simple Arab society was now by the above reasons called upon tog overn the sophisticated and progressive peoples of the vast Muslim Empire. Imam Abu Hanifah and the Iraqi school were especially inclined to the use of individual reasoning in matters of law. They developed the Muslim law to a great extent. Mr Abdur Rahim says :

"The function of analogy is to extend the law of the text to cases not falling within the purview of its terms. The writers on jurisprudence do not admit that extension of law by process of analogy amounts to establishing a rule of law. On the other hand, their theory is that analogy merely helps us to discover the law and not to establish a new law. By application of analogy the law embodied in a text may be widened generally."[6]

The Holy Prophet himself relied on analogy in deciding questions of law. For example, a man whose father, a man of means, had died without performing Hajj, asked him if it was proper that it should be performed on behalf of his deceased father (حج البدل) for the benefit of his soul. The Holy Prophet replied : "Tell me, what would you do if

5. Shah Waliyullah, "حجة اللہ البالغہ," pp. 269-70.

6. *The Principles of Muhammadan Jurisprudence*, pp. 138-39.

your father had left debts unpaid." The Holy Prophet applied analogy of a debt to show that an undischarged religious obligation should be performed by the heirs of the deceased. In this *hadith* he pointed out that دين العبد and دين الله are payable. Here, دين (debt or obligation) is an effective cause.

The Companions of the Prophet also employed *Qiyas* for the deduction of law. For instance, the punishment of a drunkard is not provided in the Qur'an. 'Umar, the second Caliph, on the consultation of 'Ali, fixed eight stripes to a drunkard. The analogy is based on the sentence of slander (قذف) which is provided in the Qur'an :

والذين يرمون المحصنت ثم لم ياتوا باربعة شهداء فاجلدوهم ثمانين جلدة ولا تقبلوا لهم شهادة ابداً و اولئک هم الفسقون o (4 : 24)

[اور جو لوگ (زنا) کی تہمت لگائیں پاکدامن عورتوں کو اور پھر چار گواہ (اپنے دعویٰ پر) نہ لا سکیں تو ایسے لوگوں کو اسی (80) درے لگاؤ اور ان کی کوئی گواہی کبھی قبول مت کرو (یہ دنیا میں ان کی سزا ہوئی) - اور یہ لوگ (آخرت میں بھی مستحق سزا ہیں اس وجہ سے کہ) فاسق ہیں -]

Here '*illat* is slander (قذف), the reason being that a person whose mind is clouded with intoxication has no control over his tongue.

If we analyse the application of *Qiyas* by the four Sunni schools, we can find that the Hanafi school accepts it *in toto* being the founder and the first exponent of it. Imam Malik and Imam Shafi'i used it sparingly. Imam Ahmad b. Hanbal denounced it, except in very exceptional cases. Mr Ahmad Hasan says : "The word *Qiyas* itself rarely occurs in Medinese

circles unlike the Iraqis in their reasoning."[7] The Iraqis, popularly called اہل الرائے, decided a lot of cases on the basis of *Qiyas*. They preferred *Qiyas* based on قرآن to خبر واحد or a weak tradition. Conversely, the Medinese preferred even a ضعیف حدیث over قیاس. They used it in rare cases.

Criticism of the Orientalists on Qiyas

There remained a violent conflict between the supporters of *Ḥadith* and the champions of *Ra'y*. Some critics think that *Qiyas* is against the spirit of Islamic law. They are mistaken because a *Qiyas* which is based on the Qur'an or *Hadith* cannot be opposed to the spirit of Islamic law. Imam Abu Hanifah had laid down that if the findings of his school were contrary to the word and spirit of the Qur'an or any authoritative *hadith* of the Prophet, such findings carried no weight. It is a fact that an analogical deduction being based on human reason is liable to err. The law based on the text of the Qur'an or *Ḥadith* or consensus of opinion is considered to be more authoritative than human reason.

Mr Goldziher believes that *Ra'y* means originally "sound opinion" as opposed to an arbitrary and irresponsible decision. But since it is purely human, therefore it is fallible. It soon acquired in polemics the derogatory meaning of arbitrary opinion particularly when it was opposed to the Prophet. Ibn Muqaffa fully discussed the position of *Ra'y* in

7. Op cit., p. 138.

Islamic jurisprudence. According to him, a Caliph cannot interfere with the major duties of religion. A wrongful order coming from him must not be obeyed. But he can give binding orders on all matters including civil and military administration on which there is no precedent (اثر) based on the Qur'an and *Sunnah*. Again, he undervalues *Ra'y* and suggests that the Caliph should regulate it. He presents a procedure of function and limitation of *Qiyas* and use of *Ra'y* and *Istihsan* by which undesirable consequence of strict reasoning can be avoided.

Professor Schacht believes that *Qiyas* has been derived from Jewish exegetical term "*hiqqish*" *inf. heqqesh*, from the Aramaic root *nqsh*, meaning, "to beat together". Further, he remarks that "this is used: (*a*) of the juxtaposition of two subjects in the Bible, showing that they are to be treated in the same manner; (*b*) of the activity of the interpreter who makes the comparison by the text; (*c*) of a conclusion by analogy, based on the occurrence of an essential common feature in the original and in the parallel case. The third meaning, he adds, in which Hellel uses the term (Palestinian Talmud 6, fol. 33 a 14), is identical with that of *Qiyas*."[8]

This view is misleading for the following reasons. Firstly, philology helps us to discover the origins and sources of the institutions of jurisprudence. But at the same time this science has its limitations also. The comparative study of different languages and

8. Abdur Rahim, op. cit., p. 99.

cultures shows that there is a large number of such common terms and institutions in those languages and culture. Mr Schacht emphasises the philological evidence. His contention is that Hebrew *hiqqish* had a meaning of *Qiyas* in the Islamic law. This view is not acceptable, because there is no direct evidence on this point that it was actually borrowed by the Muslims from Hebrew. In this discourse he miserably failed to prove the provenance of the foreign term. As both the languages, i.e. Arabic and Hebrew, belong to the same family, so their root was apparently common.

Secondly, the new manifestations of human activities and behaviour necessitate the principles and institution. Every nation discovers its own principles and institutions according to its manners and socio-economic need. It is, therefore, absurd to say that Islamic law is indebted to Hebrew in this respect. Muslim jurists vehemently deny that the principle of *Qiyas* was borrowed from foreign civilisation. It is obvious that the principles crop up from the sociological needs of the community. It was due to the growth of society, the expansion of the Muslim territory and the new cases of peculiar nature that the principle of *Qiyas* was discovered. Mr Ahmad Hasan says :

"The doctrine of *Qiyas* must have come into existence as a result of social necessity, although it acquired a theoretical basis later on. Hence, there is no question of borrowing it from anywnere. It is, in fact, a developed form of *Ra'y* that already existed from the very beginning."[9]

9. Op. cit., p. 136.

قائس and مجتہد are synonymous terms. A مجتہد receives a reward even if the decision arrived at by him is wrong, while it was right he received double the reward (*hadith*).

This idea is depicted in the following verses of 'Allamah Iqbal :

تراش از تیشۂ خود جادۂ خویش براہ دیگراں رفتن عذاب است
گر از دست تو کارے نادر آید گناہے ہم اگر باشد ثواب است

Ratio Decidendi *and* Qiyas

The maxim *ratio decidendi* may be defined as "the ground of a judicial decision". The general reason or principles of a judicial decision, as abstracted from any peculiarities of the case, are commonly styled, by writers on jurisprudence, the *ratio decidendi*.[10] Hence it means the reason of a decision. Any reason which becomes the basis of decision is called *ratio decidendi*. Suppose there are more than one poinions from which we choose one of the most appropriate and to the point opinion for basing our judgment on it. This chosen legal opinion is called *ratio decidendi*. So it may be termed as the basis of a decision in a given case. Other observations will be *obiter dicta*. In other words, *ratio decidendi* may be the findings of the case on which a judgment and decree are based.

Ratio decidendi is, in fact, a foundation or a root of a decision. Without its existence the whole super-

10. Austin, *On Jurisprudence*, p. 648.

structure will fall. *Qiyas*, on the other hand, is a regular source of Muslim law. In the absence of *Nas* it comes into action. It is actually a developed or a scientific form of *Ra'y*.

In the absence of a provision of *Qiyas* it would be difficult to decide cases of varied nature in a modern society. When the problems of a society become complex and sophisticated, the analogical deduction renders very useful service. It enhances the individual reasoning for solving the new cases of peculiar nature. The extension of law by *Qiyas* does not amount to a new law ; it only helps us to discover the law.

There is, however, a slight affinity between *ratio decidendi* and *Qiyas*. In case there are several analogical deductions, a judge may choose the most appropriate one and base his decision on it. For the sake of guidance while considering several conflicting analogical deductions the following tests are to be accepted :

(1) A deduction based on a cause having the stronger legal authority is to be preferred.
(2) If one effective cause is more acted upon in law than another, a deduction founded on the former is to be preferred.
(3) If one effective cause is found in a larger number of texts than another, the former is considered of greater legal force than the latter.
(4) If an effective cause is of such a character

that, when it is absent, the rule of law which it gave rise to is negatived, it is to be preferred to one with respect to which this test does not hold good.[11]

11. Abdur Rahim, op. cit., p. 157.

Chapter 18

COMPARISON BETWEEN THE PROCESS OF *ISTIHSAN* AND SCIENTIFIC METHODOLOGY

Istihsan means preferring or considering a thing good. This is to give preference to one *Qiyas* over the other *Qiyas*. Where a rule of law attained by analogy is either in conflict with *Ijma'* or is likely to cause hardship and inconvenience, the Hanafi jurist would refuse to follow that and instead give preference to a rule which in his opinion would better advance the welfare of man and the interest of justice. This doctrine is chiefly resorted to in those cases which arise out of the complex conditions of a growing society when a strict adherence to analogy would fail to meet the wants of the people.[1] Imam Abu Hanifah recognised it and translated it as juristic preference. It aimed at removal of discrepancies and inequities in law. In fact, this is a law of expediency. On the other hand, science may be defined as a knowledge which is reduced to a system. Scientific methodology means the science of method, a treatise or dissertation on method, a systematic classification. The scientist tries to describe *what is* and objective test may be used to discover the accuracy

1. Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, p. 166.

of the description, but *Istihsan* must prescribe *what ought to be*. *'Urf* (عرف), for example, is more acceptable to people than the decision of *Ijma'*. Under *Istihsan*, custom would be given preference because it is more suited and acceptable to a society. The jurist has to examine carefully whether a particular law suits the people or not. Mr Ahmad Hasan says :

> "A lawyer is sometimes forced to depart from a binding rule for a certain serious consideration. It depends, indeed, on one's legal acumen to distinguish where a rule is applicable and where it should be abandoned."[2]

Scientific methodology is a description now reserved for the procedure by which we gain knowledge in empirical studies such as physics, chemistry and physiology. At one time the word "science" was applied to all systematic studies or organised bodies of knowledge including mathematics and theology.[3] We live in a scientific age in which several special and more complicated methods of research are being used. For this purpose the scientists are bound to specialise themselves in techniques. With the knowledge of techniques they promote observation and theory both. Needless to say that in a scientific methodology a scientist is free to modify any theories which he finds inaccurate. He will invariably adhere to scientific truth. There will be no assumption in any respect whatsoever. But *Istihsan* creates flexibility in law. It keeps the law fresh and uptodate. It protects the people from the harshness and strictness of law. A jurist will adopt that course which is fair, just and equitable. So we can safely say that the scientific method is rigid as compared with *Istihsan*. The arbitrariness and conjectures have no room in it. The harmony in the activities and operation of the universe is present in this method.

2. *The Early Development of Islamic Jurisprudence*, p. 145.
3. *Encyclopaedia Britannica*, XX, 126.

The scientific method is too formal. According to Bacon, it is the business of the scientist to discover the "forms" of phenomena, but in his usage this word "form" means what would now be called a necessary and sufficient condition.[4] *Istihsan*, on the other hand, discards rigidity in law. It protects people against the rigour of law. Some important branches of Muslim law have their origin in it, such as the contract of *Istithna'* and *Salam*. In case there is a conflict between *Qiyas* and *Istihsan*, the latter will prevail because *Istihsan* is a panacea to the complication or inconvenience which is often faced while deducing law.

The Meaning of Rigidity and Flexibility. Rigidity presupposes that law is fixed to be administered by the court. It provides uniformity which is desirable in a modern society. It is a protection against arbitrary, biased and dishonest deductions. Moreover, it serves to protect the administration of justice from the errors of individual judgments. Mr Paton says :

> "Modern business would be difficult without fixed rules of law by which men could order their conduct. The law is wiser

4. Ibid.

than the individual view of one man."[5]

In courts of law justice demands some certainty in law because it will check the scope of arbitrariness and bias. Rigidity emphasises formality.

There are some defects of a rigid law. As it is rigid, so it is likely to lead to injustice unless some discretion is given to the judges. It becomes conservative also. It cannot be changed with the changing time.

Flexibility means the discretion. It is commonly used in two senses : (1) sometimes it means a power to depart from rules ; (2) sometimes it means a power of choice within fixed limits set up by law. In a bail matter, for example, it is the discretion of a magistrate either to release the accused on bail or not. Too much rigidity will lead to unhealthy results. With the growth of modern society a reasonable elasticity in law is necessary to decide the cases.

We apply these principles to Muslim law. So far as its fundamental principles are concerned, Islamic law is final, hence rigid. As regards its application it can be extended to the reasoning of *Qiyas* in the light of the Qur'an and *Sunnah*. Hence viewing it from this aspect of application it is flexible.

Mr Sobhi Mahmassani says :

"شرع اسلامی کے تبدیل ہونے والے احکام زیادہ تر ایسے ہیں جو جزئیات سے تعلق رکھتے ہیں اور دوسری طرف شرع اسلامی میں معاملات کے ایسے مکمل ضابطے بھی موجود ہیں جو زمانے ، ملک اور حالات کے

5. *A Textbook of Jurisprudence*, p. 200.

بدلنے سے تبدیل نہیں ہوتے ۔ شریعتوں کے قواعد کلیہ کی مثالیں یہ ہیں : ناحق قتل کا حرام ہونا ، ناجائز طریق پر لوگوں کا مال ہضم کرنے کا حرام ہونا اور زنا وغیرہ کا حرام ہونا ۔ یہ قواعد کلیہ بقول شاطبی ایسے ابدی قواعد ہیں جن پر دنیا پیدا کی گئی ہے اور جن پر لوگوں کی صلاح موقوف ہے ۔ انہی کے مطابق شرع اسلامی کے احکام آئے ہیں ۔ پس یہ ایسے قواعد کلیہ ہیں جو قیامت تک باقی رہیں گے ۔

"اس قسم کے احکام کلیہ ایسے اصولوں پر مبنی ہیں جو ازلی اور ابدی ہیں اور عدل واقعی اور خیر حقیقی کی بنیاد ہیں ۔ انہی قواعد کلیہ کا نام متقدمین نے قانون الٰہی یا فطری قانون یا ابدی قانون رکھا ہے ۔"[6]

Rigidity and flexibility must go hand in hand. Islamic law is never detrimental to the progress of a society. It copes with the socio-economic changes of the time. In order to maintain its adaptability to the changing time, the Companions and the Muslim doctors, while interpreting the true intention and object of law, deduced it by juristic equity. Islamic *Shari'ah* is based on the principle of convenience, equity and public good. It is absolutely wrong to hold, like some Orientalists, that Islamic law is rigid and static, so it lacks the capacity to keep pace with the ever-changing conditions of society. In fact, their opinion is capricious and based on a biased view. They are accustomed to destructive criticism. Actually its main causes are the lack of their knowledge with respect to the sources of Islamic law and understanding of its true intention.

As stated above, Islam does not allow the violation of the principles, but there may be a change in

6. "فلسفۂ شریعت اسلام," pp. 31-32.

details (فروعات). There is, however, an exception to this rule in this respect that according to jurists the opposition to نصوص is valid during the time of necessity because a dire necessity validates even a prohibited thing. If, for instance, a person is dying of starvation, he is permitted by Islamic law to save his life by making use of even حرام things. The elasticity and flexibility can be frequently noticed in the practice of *Qiyas* and especially in *Istihsan*. By virtue of these two doctrines Islamic law can be applied in a befitting manner in all the circumstances in every age.

Islamic law was flexible from its very beginning, There were different laws on a given problem. It was due to this reason that the Prophet gave instructions of a general nature or by validating two diverse actions in the same case. This was necessary for the development of law by means of human reason. If the laws were rigid, static and specific for every case, then the scope of *Ijtihad* or employment of human reason would have been minimised. It sometimes so happened that during the time of the Holy Prophet two persons had different interpretations in the same situation. For example, the Holy Prophet sent some of his Companions for the battle with بنو قريظه and asked them to offer their '*asr* (عصر) prayer at their destination. But it so happened that the time of the prayer came on the way. Some of the Companions offered '*asr* prayer on the way arguing that the Holy Prophet did not mean to postpone the

prayer. The other group of the Companions offered their '*asr* prayer in the territory of the enemy at night-fall under the order of the Holy Prophet. After the battle, this incident was reported to the Prophet but he kept silence meaning thereby that both the groups were right. From the above example it is clear that while framing law the Holy Prophet considered the spirit and not the form of an action. The main object in the above example is the obedience to God. It is the intention which matters (الاعمال بالنيات—Bukhari). The corollary is that difference may occur in the form of obedience due to different interpretations. In this way the difference arose in the law among the jurists.

After the death of the Holy Prophet the Companions used to decide cases either according to the law laid down by the Prophet or what they understood from the Qur'an and *Sunnah*. The main cause of difference of opinion among the Companions was due to the interpretation of the Qur'an. There are some non-explicit or ambiguous (متشابهات) injunctions of the Holy Qur'an which can either be explained by *Hadith* of the Prophet or on the basis of the opinion of the jurists. As the *ahadith* were diverse, so the difference was certain. This difference can also be noted in the case of *Hadith*. Sometimes there are contradictory *ahadith*. Some Companions followed one *Ḥadith* and some followed the other.

Another reason for the difference among the learned is the exercise of their personal opinions.

The result was that divergent opinions were given on the same case at the same time. In order to remove this defect the institution of *Ijma'* was introduced. So from the above discussion it follows that from the early days of Islam there was a sufficient scope for the difference of opinion among the jurists which implies the flexibility of the Islamic law.

Criticism of the View of the Orientalists that the First Caliphs had to Violate the Qur'an and the Sunnah

It is fallacious to think that any Muslim, not to talk of the first Caliphs, could violate the principles of the Qur'an and *Sunnah*. Sh. Ahmad Muhammad Shakir says :

"جو احکام قرآن یا سنت کی نص صریح سے ثابت ہیں انھیں نہ کسی کو تبدیل کرنے کا حق ہے اور نہ کوئی ان احکام کے علاوہ کسی دوسرے حکم کو اختیار کرنے کا مجاز ہے ، خواہ ایک شخص ہو یا پوری جماعت ۔"[7]

They were admittedly the Rightly-Guided Caliphs (خلفائے راشدین). They loved the Qur'an and *Sunnah* of the Prophet to the core of their heart. They invariably followed the footprints of the Prophet. Dr Shaikh Mustafa Hasan Sabā'i says :

"آپ کے احوال کے تتبع کی حرص اور خواہش صحابہ میں اس حد تک موجود تھی کہ اگر ان میں سے ہر شخص ہر وقت آپ کی خدمت میں حاضر نہیں رہ سکتا تھا تو وہ باہمی طور پر باری باری حاضری کا انتظام کر لیتے

7. "نظام الطلاق فی الاسلام" (Egypt, 1352) p. 90.

تھے تا کہ اسوۂ نبوی میں سے کسی شے سے وہ بے خبر نہ رہ جائیں ۔"[8]

That is why the Holy Prophet directed the Muslims to get inspiration from the Companions. The following *ahadith* are very important in this respect :

(1) اصحابی کنجوم بایھم اقتدیتم اھتدیتم ۔

[میرے صحابہ ستاروں کی مانند ہیں ۔ ان میں سے جس کی پیروی کرو گے ہدایت پاؤ گے ۔]

(2) لا تتخذوا اصحابی من بعدی غرضاً ۔

[میرے بعد میرے صحابہ کو ہدف ملامت نہ بنانا ۔]

(3) الصحابۃ کلھم عدول ۔

[میرے صحابہ عادل ہیں ۔]

(4) علیکم بسنتی و لسنت اصحابی ۔

[تم پر میری اور میرے صحابہ کی سنت لازم ہے ۔]

Due to their Divine origin no change or violation is possible in the injunctions of the Qur'an and *Sunnah*. There can't be any novel interpretation of the explicit verses (محکمات). In case of the non-explicit verses (متشابہات), different interpretations may be expected. But this construction must be in line with the *Sunnah* of the Prophet.

During the lifetime of the Prophet there was no difficulty in the decision of the cases. There are some verses in the Qur'an in which one of his duties as a judge is stated :

(1) انا انزلنا الیک الکتاب بالحق لتحکم بین الناس بما اراک اللہ (105 : 4) ۔

8. "سنت الرسول," p. 38.

[Lo ! We reveal upto thee the Scripture with the truth, that thou mayst judge between mankind by that which Allah sheweth.]

(2) و قل آمنت بما انزل الله من كتب و امرت لا عدل بينكم - (42 : 15)

[But say : I believe in whatever Scripture Allah hath sent down, and I am commanded to do justice among you.]

(3) انما كان قول المومنين اذا دعوا الى الله و رسوله ليحكم بينهم ان يقولوا سمعنا و اطعنا (24 : 51) -

[The saying of (all true) believers when they appeal unto Allah and His Messenger to jadge between them is only that they say : We hear and we obey.]

(4) و اذا قيل لهم تعالوا الى ما انزل الله و الى الرسول رايت المنافقين يصدون عنك صدودا (4 : 41) -

[And when it is said unto them : Come unto that which Allah hath revealed and unto the messenger, then seest the hypocrites turn from thee with aversion.]

(5) فلا و ربك لا يومنون حتى يحكموك فيما شجر بينهم ثم لا يجدوا فى انفسهم حرجا مما قضيت و يسلموا تسليما (4 : 65) -

[But say, by the Lord, they will not believe (in truth) until they make thee judge of what is in dispute between them and find within themselves no dislike of that which thou decidest, and submit with full submission.]

After the Prophet's death the situation became complicated. There were two basis of decision for the Companions, i.e. the Qur'an and the *Sunnah*. *Ra'y* was also the legal method to trace out which of the verses of the Holy Qur'an was applicable to a given case and which was not. But the same method

was not applicable in case of *Hadith*. Its main reason was whether that particular *hadith* in authentic or not and what was its significance. Mr Ahmad Hasan says :

"Even in the presence of the Qur'anic verses and traditions on a certain problem the employment of *Ra'y* could not be avoided. The reason for this is obvious. The Qur'anic verses and traditions are to be interpreted by the Muslims in order to be definite whether a certain verse or tradition is applicable to a certain case or not. Interpretation and application, therefore, presuppose exercise of personal judgment. Hence, since the early days of Islam, there has been perpetual conflict between the letter and the spirit of law. Thus, it is not correct to say that *Ra'y* was exercised only in the absence of the Qur'anic verses or traditions on a problem."[9]

Some scholars believe that this difference occurs in the absence of *nass*, but Imam Shafi'i pleads that the difference of opinion is also present in those matters on which there are clear injunctions in the Qur'an and *Sunnah*. The cause of this difference of opinion is the interpretation of each jurist.

Mr Sobhi Mahmassani says :

"لیکن قرآن و سنت کا حکم معاملات دنیوی سے متعلق ہو ، اس کے بارے میں اصول یہ ہے کہ اس کا منشا و مفہوم اور اس کے اسباب و علل سمجھنے چاہییں - یہاں تک تو جمہور فقہا آپس میں متفق ہیں مگر ان دنیاوی احکام کے بدلنے میں اختلاف ہے جو قرآن و سنت سے ثابت ہوں - پس بعض تو قطعی ناجائز قرار دیتے ہیں اور بعض کے نزدیک بعض صورتوں میں تبدیلی جائز ہے - مسئلۂ مذکور میں جمہور فقہا کی صحیح رائے یہ ہے کہ قرآن و سنت کے صریح حکم کی مخالفت کبھی جائز نہیں اور نہ ان

9. Op. cit., p. 118.

کے نزدیک کوئی شرعی حکم حالات کے بدلنے سے بدلا جا سکتا ہے ، بلکہ انھوں نے مخالف نص فتویٰ قبول کرنے اور دقت و مشقت کو رفع کرنے کی صرف اِنہی مسائل میں اجازت دی ہے جن کے متعلق قرآن و حدیث کا صریح حکم موجود نہ ہو ۔"[10]

A cursory view of *Ijtihad* by the Companions shows that they exercised *Ra'y* even in the presence of the injunctions in the Qur'an and *Sunnah*. Its main reason is that one Companion chose one verse or tradition to meet the situation and the other picked up another. This method cannot be labelled as the violation of the Qur'an and *Sunnah*. We again quote Mr Sobhi Mahmassani. He says :

"احکام کی تبدیلی سے مراد خدانخواستہ نصوص کی تبدیلی نہیں کیونکہ نصوص مقدسہ کو کسی صورت میں ہاتھ لگانا جائز نہیں بلکہ تغیرات احکام سے مقصود ان نصوص کی مختلف تفسیر ہے جو ضرورت کے سبب سے یا علل و عادات کے بدلنے سے لازم آئے ۔"[11]

Due to the growth of society the new problems appeared. The old customs changed. In order to cope with this situation the Caliphs softened the rigour of law. In the following lines we enumerate a few cases in which 'Umar, the second Caliph, exercised his *Ra'y* although instructions on these points are very much there in the Qur'an and *Sunnah*.

(1) It is obvious that 'Umar abolished a share of alms and charity (صدقہ و خیرات) being given to certain Muslims or non-Muslims for "conciliation of their heart" (المولفة قلوبهم). The expenditure for alms is pro-

10. Op. cit., pp. 248-49. 11. Ibid., p. 249.

vided in this verse :

انما الصدقات للفقراء و المساكين و العاملين عليها و المولفة قلوبهم و فى الرقاب و الغارمين و فى سبيل الله و ابن السبيل فريضة من الله (9 : 60) -

[صدقات تو حق ہے صرف غریبوں کا ، محتاجوں کا ، صدقہ وصول کرنے والوں کا ، ان نو مسلموں کا جن کی دل جوئی منظور ہے ، غلاموں کے آزاد کرانے میں ، اخراجات جہاد میں اور اللہ کی راہ میں اور مسلمانوں کی مدد کرنے میں ۔ یہ حق اللہ تعالیٰ کی طرف سے مقرر ہے ۔]

The Holy Prophet distributed the alms among the chiefs of the Arabs and the new Muslims to console them so that they might remain steadfast in their faith. In spite of the explicit verse of the Qur'an, 'Umar abolished this part of مولفة قلوبهم. He argued that the Prophet did it for the promotion of Islam. He said to them in the following words :

"یہ وظیفہ رسول اللہ صلی اللہ علیہ وسلم تمھیں اس لیے عطا فرماتے تھے کہ تمھاری دلجوئی کر کے تمھیں اسلام پر قائم رکھیں لیکن اب اللہ تعالیٰ نے اسلام کو طاقتور بنا دیا ہے اور تم سے بے نیاز کر دیا ہے۔ پس اگر تم اسلام پر قائم رہو تو تمھارے لیے بہتر ہے ورنہ تمھارے درمیان تلوار فیصلہ کرے گی ۔ ہم اسلام کے معاوضہ میں تمھیں کچھ نہ دیں گے ۔ لہٰذا جو چاہے ایمان لائے اور جو چاہے کافر ہو جائے ۔"[12]

Its conclusion is that when Islam became powerful, the conditions had changed altogether.

(2) In Islamic law the punishment for a thief is the cutting of his hands. This punishment is provided in the Qur'an and *Sunnah*.

و السارق و السارقة فاقطعوا ايديهما (5 : 38) -

12. Ibid., pp. 252-53.

[چوری کرنے والے مرد اور چوری کرنے والی عورت کا ہاتھ کاٹ دو ۔]

Keeping in view the basic needs of the people and their struggle for life, 'Umar suspended this punishment during the days of famine. This is the *Ijma'* of the jurists also. In this case it seems that 'Umar contravened the provision of the Qur'an. But it does not go without saying that the Qur'an does not go into detail with respect to the cutting of hands. This is for *Sunnah* or *Ra'y* to decide where to amputate the hand and where not.

(3) According to the majority of the jurists, the punishment of an unmarried adulterer is one hundred stripes and externment for one year. The externment is proved by حدیث مشہور.[13] In spite of an explicit verse it is reported of 'Umar that when he banished ربیعہ بن امیہ he colluded with the Romans. At that time the Caliph argued :

لا اغرب بعدها احدا ۔[14]

[اس کے بعد میں کبھی کسی کو شہر بدر نہ کروں گا ۔]

His decision was based on the sound reason that in such circumstances the externed Muslims would collude with the non-Muslims.

Besides these examples there are some other cases of the same nature decided by 'Umar. Apparently, it appears that he departed from the *nass*, but actually this is not the case. In doing so he strictly adhered to the spirit and intention (منشا و مراد) of the injunction based on his *Ra'y*. Though the principle of *Istihsan* was not in vogue during that period, yet these are clear instances of *Istihsan*. Mr Ahmad Hasan says :

12. "نیل الا و طار," VII, 73.
13. "تفسیر فخر الدین رازی." IV, 217.

> "The circumstances in which 'Umar had taken these decisions required deviation from an established rule on the grounds of public interest or equity or for similar other reason."[14]

Comparison of Istihsan *with the British Concept of Equity*

Equity in its broad sense means natural justice or morality. It is based only on the natural justice, otherwise it does not cover the whole cases of natural justice. In its narrow sense the portion of law which was not enforced by the common law was supplied by the courts of chancery which administered equity. It also means the body of rules formulated and administered by the courts of chancery. Equity, in fact, provided relief in cases of hardships or cases where common law is unable to provide any remedy due to its rigidity or its cumbersome procedure. Equity can be conceived with common law because it supplements those laws which are meant to meet the defects and lacunas of common law.

British equity does not always soften the rigour of law in all the cases as it claimed to administer

14. Op. cit., p. 145.

justice according to the principles of law. The maxim goes that "Equity follows the law".

Coming to the literal meaning of *Istihsan* it may be termed as "preferring or considering a thing to be good". In the technical sense, if any law deduced by analogical deduction is inequitable, inconvenient and harsh, the Hanafi jurist is at liberty to discard it and adopt one that is convenient and just. It is of the type of *Qiyas* and also termed as a Hidden *Qiyas* (قیاس خفی). ڈاکٹر مصطفیٰ احمد زرقا defines *Ihtihsan* as :

"کسی مسئلے کو اس کے حکم کے باب میں اس کے نظائر سے کاٹ دینے کا نام استحسان ہے ۔ العدول بالمسئالة عن حکمہ نظائرها الی حکمہ آخر لوجه القوی یقتضی هذا العدول یعنی قیاس ظاہر کی رو سے کسی مسئلے کا جو حکم ہونا چاہیے اور جو اس کے نظائر کا حکم ہے ، اس کے علاوہ اس مسئلے کا کوئی اور حکم بیان کیا جائے ۔"[15]

In plain words, it is to give preference to one *Qiyas* over the other. This term is used by the Hanafi doctors alone. ابو زہرہ observed thus :

"امام صاحب [ابو حنیفہ] کے استحسانات نص و قیاس سے خروج پر مبنی نہیں تھے بلکہ نص و قیاس سے تمسک پر مبنی تھے ۔"[16]

In the case of English law the way in which equity developed side by side with the common law, to abate the rigour of law, *Istihsan* developed in Islamic law in the same manner to remedy *Qiyas*. Mr Abdur Rahim says :

"If we call analogical deductions the common law of the

15. "اسلامی فقہ کے ماخذ".

16. Ra'is Ahmad Ja'fri, Tr , "امام ابو حنیفہ," p. 55.

Muhammadans, then juristic preference may be relatively styled their equity. It has largely helped to develop the Hanafi system, the founder of which deserves the credit of having been the first to recognise that a strict adherence to analogy would deprive law of that elasticity and adaptability which alone make it the handmaid of justice."[17]

In support of his argument a Qur'anic verse may be quoted :

إن الله یا مر بالعدل والاحسان (16 : 90) -

Imam Abu Hanifah and his disciples established a good reputation by deducing law in the form of *Istihsan*. There are several cases of complex nature which were decided by means of *Istihsan* by the Hanafi jurists. The same quality is found in the *Ijtihad* of Malikis. In order to redress the strictness of *Qiyas* they not only adopted the method of *Istihsan* but also widened its scope than Hanafis. The Hanafi and Maliki schools made use of this principle to promote public good in Islamic *Shari'ah* and tried to remove the hardship and inconvenience. The Qur'an says :

الذین یستمعون القول فیتبعون احسنه (18 : 39) -

[جو لوگ بات غور سے سنتے ہیں پھر اس کے بہترین حکم کی پیروی کرتے ہیں ۔]

یرید الله بکم الیسرو لا یرید بکم العسر (2 : 185) -

[اللہ تمہارے لیے آسانی چاہتا ہے اور تمہارے لیے دشواری نہیں چاہتا ۔]

17. Op. cit., p. 164.

وما جعل عليكم فى الدين من حرج (22 : 78) -

[اللہ نے تم پر دینی معاملات میں کسی طرح کی تنگی و مشقت نہیں کی ہے -]

The Holy Prophet says :

لا ضرر ولا ضرار (الحديث) -

[نہ ضرر رسانی ہونی چاہیے اور نہ ضرر میں اپنے آپ کو مبتلا کرنا چاہیے -]

'Abdullah b. Mas'ud, a Companion, reported that :

ما راه المسلمون حسناً فهو عندالله حسن (الحديث) -

[جو کچھ مسلمان بہتر سمجھتے ہیں ، وہ خدا کے نزدیک بھی بہتر ہے -]

The principle of *Istihsan* is much older than the British concept of Equity. Its roots can be traced to the days of the Holy Prophet. For example, due to intense cold 'Amr b. 'As offered prayer with تيمم in غزوة ذات السلاسل. When this matter was reported to the Prophet, he (عمرو بن عاص) quoted this Qur'anic text in support of his argument :

ولا تلقوا بايديكم الى التهلكة (2 : 195) -

[And be not cast by your hands to ruin.]

This is a clear instance of *Istihsan*. The main purpose of *Istihsan* is to remove inequity, hardship and inconvenience. It is based on public good and welfare. It is not an arbitrary opinion, but a method to take a right decision according to the circumstances of a given case. We illustrate it by an example of an Iraqi

Istihsan. If a ruler or *Imam* witnesses a man committing a crime, he cannot punish the accused person on the basis of his personal knowledge unless valid evidence is adduced. This is on the basis of *Istihsan*—a *hadith* reported from Abu Bakr and 'Umar. Here in this case *Qiyas* demands his punishment of the personal evidence of the *Imam*. It is obvious that the decision is reasonable. If it were so, then in the absence of legal evidence, the *Imam* can punish any person on the basis of his personal knowledge on the pretext of a crime. Even rules of fundamental nature can be waived in special circumstances for the sake of necessity.[18]

The British maxims of equity are remarkable and are the source of guidance in English law. We enumerate some of them as under :

(1) Equity will not suffer a wrong to be without a remedy.
(2) He who comes to equity must come with clean hands.
(3) Equity follows the law.
(4) Equity is equality or equality is equity.
(5) He who seeks equity must do equity.
(6) Delay defeats equity.
(7) Equity looks at intent rather form.
(8) Equity acts in personam.
(9) When there is equal equity then law shall prevail.

18. Ahmad Hasan, op. cit., p. 149.

(10) When the equities are equal, the first in time shall prevail.

Equity cannot overrule the law. Here law means the statutory law. Common law is different from the statutory law, because it consists of legal practices, traditions and the customs of the courts. In *Istihsan* we prefer the equitable aspect of law, whereas equity is invoked in the absence of law. It is often remarked that equity is in your favour but law is against you. A plaintiff, for example, files a suit which is under-valued and without verification. According to law, the judge may reject the plaint, but under equity the plaintiff may be allowed to make amendment.

Chapter 19

CONDITIONS FOR THE VALIDITY OF CUSTOM

A custom may be held valid if it conforms to the following requirements :

(1) A custom must be generally prevalent in the country at large.

العبرة للغالب الشائع لا للنادر ـ[1]

[وہ رواج معتبر ہوگا جو عام ہو چکا ہو اور نادر نہ ہو ـ]

It must not be a mere local usage. For instance, in Syria there is a general custom that at the time of marriage two-third of the dower is always fixed as prompt dower (معجل) and one-third is always fixed as deferred dower (غیر موجل) which is payable on divorce or death of the husband.[2] The practice of a few persons will not, however, be recognised. Although in Anglo-Muhammadan law, as it prevailed in India, a special custom of a tribe had the force of law. The custom of a particular locality cannot acquire the force of law.

(2) A custom must be continuous. Its occasional practice is not valid. It is written in قاعدہ کلیہ of "الاشباہ و النظائر" and *Majalla*:[3]

1. *Majallah*, Clause 42.
2. Ibn Nujaim, p. 37.
3. Ibid., p. 41.

انما تعتبر العادة اذا اضطردت او غلبت ۔

[وہی رواج معتبر ہوگا جو مسلسل دستور العمل رہا ہو اور عام ہو چکا ہو ۔]

For instance, if price is not fixed in a certain bargain, it will be paid according to the currency in vogue in that country.[4] So a custom must be shown to have existed and adopted continuously. Any interruption within legal memory defeats it.

(3) A custom may not be ancient but must be in general practice. It is not necessarily immemorially old. Custom, therefore, is more flexible than is sometimes supposed. The test of immemorial observance which English law now applies to special custom is a mark of modern and not primitive law.[5] Hence it is not the antiquity but general observance which matters.

(4) Custom is territorial. The custom of one country cannot affect the law of another country.

(5) Custom has authority only so long as it prevails so the custom of one age has no force in another age.[6]

(6) Custom must not be opposed to a clear text of the Qur'an or of an authentic *hadith*. Sunnis, however, agree that custom is a grade superior to *Qiyas*. A transaction, for example, under custom is legally operative even if it is against analogy. That is why

4. *Hidayah*, III, 18.
5. G.W. Paton, *A Textbook of Jurisprudence*, pp 164-65.
6. "ردالمحتار," III, 408-09.

Hanafi jurists include custom as a source of law under the principle of *Istihsan*. ابو زہرہ says:

"جب 'عرف عام' من کل‌الوجوہ نص کے خلاف نہ ہو تو اس کے مقابلے میں قیاس کو ترک کر دیا جائے گا بلکہ علما یہاں تک تصریح کرتے ہیں کہ لوگوں کا تعامل نص عام کا مخصص بن سکتا ہے ۔"[7]

For instance, the Holy Prophet forbade to sell an article which is non-existent. But there is an old custom that the people used to make a contract for securing a thing. So it will be an exception to a general law.

(7) A custom prevalent at the time of a transaction will be considered authentic and not that which comes afterwards.[8]

(8) If one of the parties fixes such a condition which is against custom, then the custom will not be effective because custom is a supplementary condition (ضمنی شرط) which disappears in the presence of an explicit condition (صریح شرط).

(9) It is written in "مجامع" :

العرف انما یکون حجة اذا لم یخالف نص الفقہاء ۔[9]

[عام رواج اس وقت حجت بن سکتا ہے جب وہ فقہا کے صریح حکم کے خلاف نہ ہو ۔]

According to this principle, custom is not effective in the presence of نص شرعی, because it is more authentic and reliable than custom. In case a *nass* is based on general custom (رواج عام), then in the opinion

7 "ابو حنیفہ," p. 562.
8. Suyufi, "الاشباہ و النظائر," p. 68 ; Ibn Nujaim, p. 40.
9. "مجامع," p 324.

انما تعتبر العادة اذا اضطردت او غلبت ۔

[وہی رواج معتبر ہوگا جو مسلسل دستور العمل رہا ہو اور عام ہو چکا ہو ۔]

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7 "ابو حنیفہ," p. 562.
8. Suyufi, "الاشباہ و النظائر," p. 68 ; Ibn Nujaim, p. 40.
9. "مجامع," p 324.

of Imam Yusuf custom will be given preference.

(10) Custom must be reasonable. Mr Sobhi Mahmassani says :

"یہ ضروری ہے کہ رواج طبائع سلیمہ کے نزدیک پسندیدہ ہو ، یعنی وہ قرین عقل ہو اور ذوق سلیم یا رائے عامہ اس کی تائید کرتی ہو ۔"[10]

It is unreasonable if it is repugnant to statutory law. Moreover, it is unreasonable in this sense also if it benefits one person to the detriment of all others. It should be noted here that the time to decide reasonableness of a custom is the time of its origin.

(11) A custom must have a peaceful enjoyment. There must be no violence in its observance.

(12) A custom must not be exercised by concealment nor by licence. A secret custom can have no existence. Hence no force in law. Again, a custom based on licence depends upon the will of the grantor and has no public observance.

Custom and Sunnah

'Urf (عرف) and *'Adah* (عادة) are synonymous terms. ابن نجیم defines it thus :

عبارة عما يستقر فى النفوس من الامور المتكررة المقبولة عندالطباع السليمة ۔[11]

[رواج سے مراد روزمرہ کے وہ معاملات ہیں جو ذوق سلیم کے نزدیک پسندیدہ ہوں اور دل میں گھر کر جائیں ۔]

In the same way custom is called العادة محكمة

10 "فلسفۂ شریعت اسلام," p. 303. 11. Suyuti, op. cit., p. 37.

[رواج فیصلہ کن چیز ہے].

Mr Sobhi Mahmassani says :

"فقہا کا اجماع اس امر کی دلیل ہے کہ امور شریعہ میں رواج معتبر ہے اور یہ اجماع اسلام کے سابقہ فیصلوں پر مبنی ہے جیسے عبداللہ بن مسعود کا قول ہے کہ ما راہ المسلمون حسناً فھو عنداللہ حسن [جو بات عام مسلمانوں کے نزدیک اچھی ہے وہ خدا کے نزدیک اچھی ہے] ۔"[12]

In the pre-Arab society old customs were the basis of their civilisation. With the advent of Islam the entire Islamic law was based on Divine revelation and the importance of custom (رواج) subsided. According to Muslim scholars, custom is not a regular source of law but somehow or other it affected the Islamic law. In the absence of an explicit نص, Imam Malik holds the practice of the people of Medina as *Ijma'* and the source of law. ابو زہرہ says :

"امام صاحب [ابو حنیفہ] عرف کو اصول استنباط میں خیال کر کے اس سے اخذ کرتے تھے اور جب استنباط کی تمام راہیں مسدود ہو جائیں تب اس کی طرف رجوع فرماتے تھے - عرف بھی دلیل شرعی کا حیثیت رکھتا ہے اور نص نہ ہونے کی صورت میں نص کی طرح اس پر اعتماد کیا جا سکتا ہے ۔"[13]

So far as *Sunnah* is concerned, this term was also in vogue in pre-Islamic days. The Arabs used it for old customs and an excellent conduct of their ancestors. It was also used for customary law or common law. They decided their cases by rules established by custom. لبید بن ربیعہ, a famous Arab poet, says :

من معشر سنت لهم آباؤهم ولكل قوم سنة و امامها

12. Op. cit., p. 301. 13. "ابو حنیفہ," p. 560.

[(He comes) from a tribe for whom their ancestors have left a normative behaviour; every people has a *Sunnah* and its originators.]

Similarly, it is reported in صحیح بخاری that during the reign of 'Umar, قاضی شریح said to the weavers :

سنتکم بینکم -

[تمہارا دستور و رواج تم میں باقی رکھا جائے گا -]

Custom and usages of the people of a country which were not repealed or condemned by Islam were deemed to have been sanctioned by God and the Prophet. Custom comes next to the Qur'an, *Sunnah* and *Ijma'*. Some pre-Islamic customs which were not repealed were sanctioned by the silence (سنت تقریری) of the Holy Prophet. Dr Muhammad Hamidullah says, "under source No. 2, that what the Prophet tolerated among his Companions rendered it valid and lawful. The very toleration (تقریر) implies the recognition of custom, no matter old or new, as a source of law. As for late times the all-pervading maxims (الاصل الاباحة) [everything that is not prohibited is permissible] and العرف قاض [custom or rule of convention is decisive] leave not the slightest doubt that custom and usage, with certain qualification, are lawful sources of rules of conduct for the Faithful."[14]

Custom may claim authority from any *Sunnah* of the Holy Prophet in this manner that he did not object to any custom of usage which the Muslims

14. *The Muslim Conduct of State*, p. 67.

practised and followed in his presence. It is thus a part of *Sunnah* (سنت تقریری).

There is, however, no direct authority to act upon custom and usages (عرف) in the Holy Qur'an. But, according to some scholars, there is an indirect Qur'anic authority for the recognition of عرف. It is reported in *Hidayah* that "As Allah has enjoined that the husband should either retain the wife according to well-recognised custom (امساک بالمعروف) or release her with grace (تسریح بالاحسان) or the *Qadi* will release on his behalf."[15] Here *'Urf* is recognised in marital behaviour. In this report امساک means the prevailing practice. It may be equity. For more knowledge the following cases may be studied :

بلقیس فاطمه بنام نجم الاکرام قریشی - (P L D 1959 Lah. 566)

سعیده بیگم بنام محمد سمیع - (P L D 1952 Lah. 113)

This is an historical fact that Islam did not altogether abrogate the legal system prevalent in pre-Islamic days. Those customs which were not contrary to the Qur'an and *Hadith* were retained and the cases were decided in the light of these customs having the force of law. "It would not be correct to suppose that Islam professed to repeal the entire customary law of Arabia, and to replace it with a code of altogether new laws. The fact is, the groundwork of the Muhammadan legal system, like that of other legal systems, is to be found in the custom and usages of the people among whom it grew and

15. *Hidayah*, V, 377.

developed. Partnership, for example is lawful because the Prophet found people practising it and confirmed them therein.[16] It is, therefore, obvious that the Islamic *Shari'ah* recognised a number of pre-Islamic customs either expressly or impliedly. Islam, for instance, recognised it as a valid wedlock in which a man asks another person for the hand of his daughter and then marries her by fixing a dower.

The reason for the reception of custom was due to the fact that since custom contains rules already generally accepted, so courts find it convenient to adopt it as law instead of making some new rules which may put them to trouble and cause hardship.

Again, the adoption of custom as law provides a guarantee for its continuity in future. Moreover, it provides the material out of which the law can be framed.

Islam generally adopted those customs which did not conflict with any rules of the Qur'an and *Hadith*. These customs become part and parcel of the Islamic law in the form of *Ijma'* or *Istihsan*. Mr Sobhi Mahmassani says:

"بہر حال جو رواج کہ ہمارے پیش نظر ہے اور جو شرع اسلامی میں خارجی دلیل کی حیثیت رکھتا ہے، اس سے مراد وہی رواج ہے جو اصولی ہو اور معتبر دلیل شرعی کے موافق ہو۔ لیکن جو رواج دلیل شرعی کے خلاف ہو یا شرع اسلامی کی روح، اس کی مصلحت اور اس کے صریح احکام کے خلاف ہو وہ قابل قبول نہیں اور اس سے شریعت مہدی کا

16. A. Rahim, *The Principles of Muhammadan Jurisprudence*, p. 1.

کوئی واسطہ نہیں۔"[17]

Custom and the Orientalists

The Orientalists' allegation is that the Muslim jurists adopted the customs of the pre-Islamic period and gave them the form of the Islamic law. They believe that Islam has no legal system of its own. Moreover, they think that Imam Abu Hanifah and Imam Malik adopted the customs of Iraq and Medina respectively and termed them as Islamic *Fiqh*. So far as these allegations are concerned, they are based on the lack of Qur'anic and Traditional study. It is the result of their capricious and biased attitude towards Islamic law. The actual position is that the pre-Islamic customs are helpful in understanding the Islamic law. The Holy Prophet did not discard the pre-Islamic customs altogether. Some of them are retained. Here the question arises why such customs are retained. The reason is that in fact God is the Author of all laws. He is the law-giver from the creation of this universe. He sent His commandments to the people from time to time through His Messengers. Actually, some of these customs are revealed. Once they were part and parcel of the previous شرائع. The conceptions of بیع and ربوا, for instance, were present before the dawn of the Islamic period. The Arabs were familiar with these terms. That is why the Qur'an says:

17. Op. cit., p. 299.

احل الله البيع و حرم الربوا (2 : 275) ۔

[Allah permitteth trading and forbiddeth usury.]

Mr Sobhi Mahmassani says:

"جب اسلام ظاہر ہوا تو قرآن و حدیث کے احکام ہی پر قانون سازی کی بنیاد رکھی گئی۔ بہر صورت علمائے اصول کے نزدیک رسم و رواج کسی دلیل شرعی کی حیثیت تو نہیں رکھتے تاہم مختلف راستوں سے اسلامی قانون سازی میں داخل ضروری ہو گئے۔"[18]

The Holy Prophet adopted those customs only which were prevalent among the Arabs. Some of them attained the force of law through his toleration or silence (سنت تقریری).

Mr Sobhi Mahmassani says:

"سنت تقریریہ نے عربوں کے بہت سے رواجات کو برقرار رکھا، یعنی نبی کریم صلی اللہ علیہ و آلہ وسلم نے بعض پسندیدہ عادات پر اپنی خاموشی کے ذریعے رضامندی کا اظہار فرمایا، چنانچہ وہ رسوم و عادات مسنون رواجات کا جزو بن گئی ہیں۔"[19]

The customs of other countries are distinct from the pre-Islamic customs. Moreover, the customs of the present time cannot become Islamic law. They can be Islamicised only.

So keeping in view the above facts it is quite obvious that the objections of the Orientalists in this respect are baseless and have no evidentiary force. In fact, Islam has its own independent legal system. It is not indebted to pre-Islamic customs.

18. Ibid.

19. Ibid.

PART II

LAW

Chapter 1

ROMAN LAW

Salient Distinctive Features of the Islamic Law and the Roman Law

(*a*) *Salient Distinctive Features of Islamic Law.* علامہ شیخ محمد خضری بک has enumerated the following three features of the Islamic Law:[1]

(1) عدم الحرج. It means the absence of inconvenience. The Islamic law is based on the principle of removing the hardships. God praises the Prophet Muhammad (peace be upon him) in the following words :

(الف) و یضع عنهم اصرهم والاغلال التی کانت علیهم (7 : 157) -

[اور آن لوگوں پر جو بوجھ اور طوق تھے ان کو دور کرتے ہیں -]

Again, He instructs the people to pray in these words :

(ب) ربنا ولا تحمل علینا اصراً کما حملته علی الذین من قبلنا ربنا ولا تحملنا ما لا طاقة لنا به (2 : 286) -

[اے ہمارے رب ! اور ہم پر کوئی سخت حکم نہ بھیجیے جیسے ہم سے پہلے لوگوں پر آپ نے بھیجے تھے - اے ہمارے رب ! ہم پر کوئی ایسا بار نہ ڈالیے جس کی ہم کو سہار نہ ہو -]

It is reported in *Hadith* that in response to this

1. "تاریخ فقہ".

prayer Allah says : فعلت [I have done this work].

(ج) لا یکلف اللہ نفساً الا وسعها (2 : 286) -

[اللہ کسی کو مکلف نہیں بناتا مگر اس کا جو اس کی طاقت اور اختیار میں ہو -]

(د) یرید اللہ بکم الیسر ولا یرید بکم العسر (2 : 185) -

[اللہ تعالیٰ کو تمہارے ساتھ (احکام میں) آسانی کرنا منظور ہے اور تمہارے ساتھ دشواری منظور نہیں -]

(ر) وما جعل علیکم فی الدین من حرج (22 : 78) -

[اور تم پر دین کے (احکام میں) کسی قسم کی تنگی نہیں کی -]

(س) یرید اللہ ان یخفف عنکم و خلق الانسان ضعیفا (4 : 28) -

[اور اللہ تعالیٰ کو تمہارے ساتھ تخفیف منظور ہے اور آدمی کمزور پیدا کیا گیا ہے -]

(ص) ما یرید اللہ لیجعل علیکم من حرج (5 : 6) -

[اللہ تعالیٰ کو یہ منظور نہیں کہ تم پر کوئی تنگی ڈالیں -]

There are some *ahadith* of the Prophet in connection with عدم الحرج, e.g.

بعثت بالحنیفیة السمحة (بخاری) -

[میں سیدھی سادی اور آسان شریعت دے کر بھیجا گیا ہوں -]

The method of the Holy Prophet, reported in *Hadith*, is as follows :

ما خیر بین امرین الا اختار الیسر ها ما لم یکن اثما -

[آپ کو جب دو باتوں میں سے کسی ایک بات کا اختیار دیا جاتا تو آپ آسان ترین کو اختیار کرتے تاوقتیکہ وہ گناہ نہ ہو -]

In short, most of the rules are deduced from this principle. Several facilities are availed through it,

e.g. *Iftar* for a traveller, permission of حرام things in case of dire necessity and تیمم for an ailing person, etc.

(2) تکالیف کی کمی. In the *Shari'ah* terminology the term تکالیف means to allow and prohibit something. Allah alone has the authority for it. God says :

یا ایها الذین آمنوا لا تسالوا عن اشیاء ان تبد لکم تسوکم و ان تسالوا عنها حین ینزل القرآن تبدلکم (5 : 101) -

[اے ایمان والو ! ایسی فضول باتیں مت پوچھو کہ اگر تم پر ظاہر کر دی جائیں تو تمہاری ناگواری کا سبب ہو اور تم زمانۂ نزول قرآن میں ان باتوں کو پوچھو تو تم سے ظاہر کر دی جائیں گی -]

In the above verse God forbids the Muslims to ask about those things which are not declared as forbidden (حرام) by Him. The philosophy of this prohibition is due to this reason that in doing so the Muslims may be put to trouble if they are declared حرام or واجب.

(3) تدریج. For eradicating ills and vices of the society, God did not send orders at once. He removed them slowly and steadily. By this process He intended to prepare their minds for the laws in stages. Here the example of wine and gambling may be cited. God rectified the ills step by step by the following verses :

یسئلونک عن الخمر و المیسر قل فیها اثم کبیر و منافع للناس و اثمها اکبر من نفعها (2 : 219) -

[لوگ آپ سے شراب اور قمار کے بارے میں دریافت کرتے ہیں۔ آپ فرما دیجیے کہ ان دونوں کے استعمال میں بڑی بڑی گناہ کی باتیں ہیں اور

لوگوں کے لیے (بعضے) فائدے ہیں اور وہ گناہ کی باتیں ان باتوں سے زیادہ بڑھی ہوئی ہیں -]

Again, another verse of the Qur'an is revealed that :

یا ایها الذین آمنوا لا تقربوا الصلواة و انتم سکاری (4 : 43) -

[اے مومنو ! نشہ کی حالت میں نماز کے قریب بھی مت جاؤ -]

Lastly, its complete حرمت was declared in this verse :

یا ایها الذین آمنوا انما الخمر والمیسر والانصاب والازلام رجس من عمل الشیطان فاجتنبوه لعلکم تفلحون انما یرید الشیطان ان یوقع بینکم العداوة والبغضاء فی الخمر و المیسر و یصدکم عن ذکر الله و عن الصلاة فهل انتم منتهون (5 : 93-94) -

[اے ایمان والو! بات یہی ہے کہ شراب اور جوا اور بت وغیرہ اور فرعہ کے تیر یہ سب گندی باتیں ہیں - سو ان سے بالکل الگ ہو تا کہ تم کو فلاح ہو - شیطان تو یوں چاہتا ہے کہ شراب اور جوئے کے ذریعہ تمہارے آپس میں بغض اور عداوت واقع کرے اور اللہ کی یاد اور نماز سے تم کو باز رکھے - [پس کیا ہو تم باز رہنے والے ؟]

Other salient features given by ڈاکٹر عبدالقادر عودہ are as follows :

(4) *Perfection* (کمال). It encompasses all principles, rules and conceptions which are needed to a perfect *Shari'ah*. Moreover, it is free from the bondage of other legal systems.

(5) *Perpetuity* (دوام). The Islamic law is for all times to come. The نصوص of *Shari'ah* do not require amendment or change in any set of circumstances. They are established, permanent and suitable to all times and ages.

(6) *Loftiness* (رفعت و بلندی). Islamic law is so dignified and magnificent that it is fit even for every ultra modern society. Its dignity and loftiness is for ever. It can also keep pace with the sophisticated social set-up.

(7) "The science of Islamic jurisprudence," says Mr Anwar A. Qadri, "is considered as an evergreen system, vigorous and vital in nature and features. It has a methodology out of which solutions for new problems of law in the light of changes in people's habits and modes of living can be drawn."[2]

(8) Islamic law "is based upon heavenly principles, and its institutions are sacred. The infringement of the moral rules of the system, as opposed to secular rules, includes unlawful conduct and is also a sin against religion and God."[3]

(9) Islamic law has the quality of moderation.

(10) It embraces all the various departments of human life. Besides, it is a complete scheme of life and an all-embracing social order—nothing superfluous, nothing lacking.[4]

(11) Another remarkable fact about the *Shari'ah* is that it is an organic whole. Islam signifies the entire scheme of life and not any isolated part or parts thereof.[5]

(*b*) *Salient Distinctive Features of Roman Law.* In

2. *Islamic Jurisprudence in the Modern World*, p. 214.
3. Ibid., p. 36.
4. Khurshid Ahmad, Ed., *The Islamic Law*, p. 19.
5. Ibid., p. 20.

the cultivation of law," says Lord Mackenzie, "the Romans carried off the palms from all the nations of antiquity."[6]

The salient features of the Roman law may be enumerated thus :

(1) The Romans have the credit of the first successful cultivation of law as a science.

(2) The Roman judicial system is favourable to the improvement of jurisprudence and to the formation of equitable laws. Moreover, it is helpful in the study of historical jurisprudence.

(3) By virtue of praetor's edicts, the decision of the judges, the hard labour of lawyers, aided by the legislature, the general body of the Roman law was moulded into a system and state of perfection.

(4) It has close affinity with the modern legal systems.

(5) It occupies an honourable place among legal studies in lieu of its scientific character and educational value.

Is Islamic Law Indebted to Roman Law?

The Orientalists think that the highest degree of consistency with which Islamic law was compiled is due to the influence of Roman law. They state :

(1) That most of the Hanafi propositions (مسائل) are like Roman law.

(2) That Roman law was in force throughout Syria. As the Muslims were impressed by their

6. *Studies in Roman Law*, Introduction.

civilisation and culture, so it was most probable that Muslim scholars were influenced by Roman law regarding legal problems.

(3) Such an exhaustive *Fiqh* necessitates the help of some other laws of the world.

Muslims got very meagre help from the non-Muslims with respect to law. We find several translated books, but they are concerned with philosophy and medicine. We can't find any law book which was translated into Arabic in those days. It is quite clear that during that period when Abu Hanifah compiled *Fiqh*, no such book was translated into Arabic. So it is a baseless idea that he is influenced by legal works of the non-Muslims. The law based on customs was not of such a high calibre as could be labelled as a law. In short, it is not proved by the existing evidence that the Imam got any legal book of Rome or Persia and on its pattern he laid the foundation of Islamic *Fiqh*. There is no denying of this fact also that all those juridical propositions which were compiled before him, no matter in what form and number, had no significance of science. He got assistance from the عرف, مسائل معمول بہا and the فتاوىٰ of علماء, but this is such a sort of help from which no compiler of the world is free.

Mr Sheldon Amos, Professor of law in London University, has vehemently advocated in his book, *Roman Civil Law*, the sense of superiority which Europe has all over the nations in general and Muslims in particular. The European authors

look down upon the achievements of the Muslims. If they notice some sort of excellence and perfection, they think that this is not a device of Muslims but taken from Greece and Egypt. Mr Sheldon applied the same principle to Hanafi *Fiqh* and extended it to the general law of Islam.

The Professor has proved by historical evidence that when Muslims conquered Syria and Egypt there were several colleges of Roman law. A team of lawyers lived in Qaiseria (قیصریہ). Legal education was given in Alexandria. In this way he has tried to prove the influence of Roman law over Islamic law.

He based his arguments on the finality of this view that there are so scanty commandments (احکام) in the Qur'an that no law can be based on them. Again, he uttered that Roman law was already in force in countries conquered by Muslims.

The learned Professor claimed that there were a few مسائل in the whole of the Qur'an. Its detail is given below:

(1) Do not make God the target of your oaths.

(2) You can divorce your wives twice, then separate them by affection.

(3) The interest-receiver will be like one bewitched on the Day of Judgment.

(4) Debt for limited or terminable period should be written.

(5) If you can do justice with your wives, then you can marry more wives but not more than four.

(6) A male member will get two shares and female gets one. If there are only females then two shares. The husband will get one-half.

(7) At the time of will during مرض الموت witnesses are essential.

(8) There are twelve months in a year.

(9) Write a treaty of freedom to مکاتب, if you please.

(10) The punishment of *Zinā'* and backbiting.

No doubt, the Professor is well versed in Roman law, but his mastery over Islamic law cannot be acknowledged. His view is that there are a few commandments in the Qur'an (the detail has been given above). But the actual position is that there are more or less five hundred verses of commandments. Although most of them are about devotion (عبادات), etc., yet the particular verses containing legal injunctions (قانونی احکام) are not less than one hundred. These verses have been collected and Muslim scholars have written several commentaries on them such as جصاص : "احکام القرآن" and ملاجیون : "تفسیر احمدی". The learned Professor is quite ignorant of these books. It is regrettable that he could find only two commandments for marriage and divorce, i.e. number of *talaq* and number of *nikah*), but in reality there are so many other injunctions regarding these topics such as جمع بین , منکوحة الاب طلاق قبل خلوت صحیحہ مسائل and طلاق قبل خلوت و بعد خلوت , نکاح بامشرکات , الاختین of both, خلع and ایلا, etc., are dealt with in detail in the Holy Book.

So far as inheritance is concerned, the learned Professor knows only the share of husband or male who gets double the share of a female. There is a full chapter of inheritance in the Holy Qūr'an, especially the shares and commandments for parents and کلالہ are explicitly given. The problems of retaliation and blood-money which are given in detail in the Qur'an, especially of قتل عمد and قتل خطا, are unknown to him.

He himself acknowledges that in the beginning of Islam, that is, up to the last days of the Rightly-Guided Caliphs, Muslims remained secluded from foreign nations and did not get any information from their laws and rules. So, according to his version, the institutions of Beirut and Alexandria could not influence Islamic law. Now the question remains as to those problems which, according to him, are identical to Roman law, e.g. regarding inheritance. He reiterates that in Islam shares are distributed according to Roman law. These are the complete shares: one-half, one-fourth, one-fifth, two-fifths, one-third and one-sixth. The same shares are in Roman law. He does not know that these shares are prescribed in the Holy Qur'an. With respect to the Qur'an he himself acknowledges that it is immune from the influence of Roman law. No doubt, the shares of some persons are not given in the Qur'an, but during the days of the Prophet and Caliphs these shares were fixed.

The learned Professor thinks that regarding "will" (وصیت) the Islamic law is indebted to Roman

law. In fact, these are the problems of the early days of Islam when Muslims were not influenced by legal teachings and books of non-Muslims. According to him, there are only a few legal مسائل in the Qur'an and *Hadith*. How can a big volume of *Fiqh* be based on them. It compelled him to say that Islamic *Fiqh* is indebted to Roman law. Take it for granted that if legal مسائل are taken from Roman law there is no ample explanation of "Prayer," "Fast," "*Hajj*" and "*Zakat*" in the Qur'an, even then there is a magnificent achievement in this respect. Is Islamic law indebted to Roman law in this respect also?

Moreover, there are other branches of knowledge, e.g. تفسیر ، حدیث ، اصول حدیث ، اصول فقه ، اسماء الرجال, in which the Muslim scholars have done a marvellous work. Now all these branches of knowledge are separate sciences. It shows the great intelligence and understanding of Muslims. Have the Muslims learnt these sciences from Romans and Greeks?

The problems of *Fiqh* which he alleges to be taken from Roman law are the problems of that period in which, according to him, Muslims did not learn anything from the non-Muslims. But even after that period Muslims are not indebted to any foreign law.

The allegation of the learned Professor is true that during the progressive Abbasid period, Muslims acquired knowledge of different sciences from Greece and Rome. It was one group of scholars. But at the same time there was another group of scholars who, by dint of their knowledge and skill, did not care even

to see towards the knowledge of other nations. مجتہدین and فقہا are included in this group. All those books from Greece and Rome which were translated into Arabic belong to Philosophy, Medicine, Geometry, Chemistry, Industry, History, Biography, Novels, Fiction, etc., but no legal book was translated, the only reason being that the jurists who were the compilers of Islamic law regarded such inspiration and influence as حرام. We cannot imagine that the eminent scholars like امام ابو حنیفہ , امام مالک , امام شافعی and امام احمد بن حنبل who believed that مسائل فقہ which are part and parcel of Islam should be learnt from Rome and Greece. It is a pity that the Professor did not know the life-sketches and achievements of these scholars, otherwise he could not claim so. Sobhi Mahmassani says:

"مسلمان فقہا کا اسلامی قانون کی طرف توجہ نہ کرنے کا سبب ان کا یہ عقیدہ تھا کہ شریعت اسلامیہ خدائی شریعت ہے جو اپنے اصول اساسی کے لحاظ سے قرآن کریم پر مبنی ہے اور یہ کہ وہ کامل ترین قانون ہے - یہی سبب تھا کہ مسلمان فقہا غیر مسلموں کا کوئی قانون اختیار نہ کرتے تھے ، بلکہ اسے اختیار کرنے کو حرام سمجھتے تھے - کتاب 'تاریخ الثقافة شرفیہ' (صفحہ ۵۳۳-۵۳۴) نے باوجود یہ دعویٰ کرنے کے کہ فقہ اسلامی قانون رومانی سے متاثر ہے خود اس حقیقت کا اعتراف کیا ہے -"[7]

Now the question arises as to why the Islamic *Fiqh* and the Roman law are identical in some respects. The real position is that this is not particular to Islamic *Fiqh* only. If we have a comparative study of different legal systems there are some propositions

7. "فلسفۂ شریعت اسلام," p. 222.

which are common in them and this is but natural because when human nature and requirements throughout the world are common, it is not strange when laws framed for them are also common.

The Prophet is never مطیع; he is مطاع. He did not borrow Roman law. Where is the punishment of cutting of a thief's hand in the Roman law? There was no influence of Roman law in Arabia. There were revealed religions before Islam. The Prophet spent thirteen years in Mecca and ten years in Medina after بعثت. The borrowing of such laws was possible from Old and New Testaments, but the Holy Prophet did not pay any heed to them in the presence of the Qur'an. This was the fact which was acknowledged even by Jews and Christians of the Prophet's time. Stoning (رجم) was also prescribed in توریت. A case of *Zinā'* was presented before the Holy Prophet in which the Jews wanted to conceal the real law, but it is provided in the Qur'an (فاتوا بالتورة ان کنتم صادقین). There is another verse:

ولیحکم اھل الانجیل بما انزل اللہ -

Once in a case, 'Umar referred to a verse of توریت. The Holy Prophet flew into a rage and rebuked him. He said:

والذی نفسی بیدہ لو ان موسیٰ کان حیاً الیوم ما وسعہ الا ان یتبعنی -

[مجھے اس ذات پاک کی قسم ہے کہ جس کے قبضۂ قدرت میں میری جان ہے کہ اگر آج موسیٰ بھی زندہ ہوتے تو شریعت محمدیہ پر چلتے -]

'Umar apologised.

Mr Sobhi Mahmassani gives the summary in the following words :

"شرع اسلامی اور رومی قانون کی مشابہت بہ نسبت ان دونوں کے باہمی اختلاف کے بہت ہی قلیل ہے اور یہ بات بھی واضح ہو گئی کہ صرف اتنی سی مشابہت اس امر کی دلیل نہیں بن سکتی کہ شرع اسلامی رومی قانون سے متاثر ہے -

"اس کے علاوہ یہ کہ مسلمان فقہا کی روش شریعت اسلامیہ کی روح اور اس کے ماخذ الٰہی کے پیش نظر قانون رومانی اختیار کرنے کے منافی تھی ، کیونکہ فقہا نے رومی قانون کے ملتحت ممالک کے صرف انہی رواجات کو اختیار کیا اور وہی رواجات شرع اسلامی میں داخل ہونے پائے جن کے خلاف قرآن و حدیث یا اسلام کے اصول اساسی میں کوئی حکم موجود نہ تھا -

"بہر صورت وہ رواجات خالص رومی نہ تھے بلکہ یہ وہی تجارتی رواجات تھے جو عرب اور بحر متوسط کی دیگر قوموں میں بھی پائے جاتے تھے اور جن سے اہل رومہ خود اس قدر متاثر ہو چکے تھے کہ انھوں نے مسلمانوں سے پہلے ہی ان رواجات کو اپنے قانون میں شامل کر لیا تھا - شرع اسلامی جس طرح چند غیر ملکی رواجات سے متاثر ہوئی اس طرح اس نے جدید معاشرتوں پر بھی اپنے اثرات چھوڑے ہیں -

"یہ ایک ناقابل تردید حقیقت ہے کہ سوائے قلیل تاثر کے شریعت اسلامی ایک ایسا مستقل قانون ہے جو کسی سے ماخوذ نہیں - اس کے اپنے مخصوص ضابطے اوز اپنی شاندار تاریخ ہے - اس امر کی تائید جامع الازہر شریف کے مندوبین نے بھی اپنے بیان میں کی ہے جو انھوں نے تقابلی قانون کی بین الاقوامی کانفرنس منعقدہ ہیگ ۱۹۳۷ میں دیا ہے -"[8]

8. Ibid., pp 327-28.

Chapter 2

CONSTITUTIONAL LAW

The Western Theory of Sovereignty

The concept of sovereignty has been called the very basis of modern political science. "Sovereignty is the supreme will of the State," says Willoughby. There is a distinction between sovereign and subordinate power *qua* the theory of the State. The former is absolute and uncontrolled within its own sphere, while the latter is subject to the control of some power superior and external to itself.

The famous Hobbes theory of sovereignty may be reduced to three fundamental propositions :

(1) The Sovereign power is essential in every state ;

(2) It is indivisible ; and

(3) It is unlimited and illimitable.

Sovereignty Essential. Every political society involves the presence of a supreme power, otherwise all power would be subordinate. There is nothing to prevent sovereignty which is external to the State. It is, indeed, only in the case of those States which are both independent and fully sovereign that sovereignty is wholly internal. When a State is independent, sovereign power is vested wholly or in part in the larger unity, and not in dependency itself. On

the other hand, when a State, though independent, is only semi-sovereign, its autonomy becomes defective by the superior State.

Indivisible Sovereignty. Every State involves a sovereign, that is, one person or body of persons in whom the totality of sovereign power is vested. Such power cannot be shared between two or more persons. For example, the whole sovereignty may be in A, or the whole of it in B, or the whole of it in A and B jointly, but it is impossible that part of it should be in A and the residue in B.

Illimitable Sovereignty. Among the chief functions of soveign power is legislation. It every political society there exists some single authority having unlimited legislative power. This power is the test of sovereignty. He and he alone is the sovereign of the State, for he necessarily has power over all and in all, and is subject to none.

Examples. (1) As the law of England stands, there are no legal limitations on the legislative power of the Imperial Parliament.

(2) The most striking illustration of the legislative omnipotence of the English Parliament is its admitted power of extending the term for which an existing House of Commons has been elected.

In the United States sovereignty is vested not in Congress but in a majority of three-fourths of the State Legislatures. This composite body has absolute power to alter the constitution. It possesses unlimited legislative power.

Islamic Theory of Sovereignty

In Islam sovereignty lies not in man but in Allah, the Creator of the Universe. He is the Supreme Legislator Whose Commandments (احکام) are obligatory. مولانا محمد اسحاق سندیلوی says:

"مقتدر اعلیٰ (Sovereign) نظام سیاست کا مرکزی حصہ ہوتا ہے جس کے گرد پورا نظام گردش کرتا ہے۔ اس اعتبار سے اسلام کا نظام سیاسی دنیا کے ہر سیاسی نظام سے کلیۃ ممتاز ہے۔ اس میں اقتدار اعلیٰ اس اعلیٰ ہستی کے ساتھ مخصوص سمجھا جاتا ہے جو حقیقی مالک کائنات ہے۔ و للہ ملک السموت و الارض۔ نظام خلافت کے اجزائے ترکیبی میں اقتدار اعلیٰ کے مندرجہ بالا تصور کو جزو اعظم کی حیثیت حاصل ہے۔ اسلامی نظام سیاسی میں اس کی وہی حیثیت ہے جو نظام شمسی میں آفتاب کی۔"[1]

The concept of sovereignty holds a central position in Islam. Mr Haroon Khan Sherwani says :

"The concept of Sovereignty in Islam, like all other concepts, pervades the whole life of man, and consequences flow from such a phenomenon which do not appear at first sight. . . . If we look at the Islamic precepts of conduct from the purely mundane point of view we would come to the conclusion that one of the greatest revolutions it created in the human way of thinking was that of the absolute and unconditional unity of God, and in this is couched the conception of centralization in action. In a pithy verse the Qur'an embodies the whole illogic of polytheism and the resulting chaos that would ensue. Had there been more gods (in heaven and earth), then there would have been chaos indeed."[2]

لو کان فیھا آلھۃ الا اللہ لفسدتا (21 : 22) -

1. "اسلام کا سیاسی نظام," p. 9.
2. *Studies in Muslim Political Thought and Administration*, pp. 264-65.

The Islamic concept of sovereignty is perfectly simple and intelligible. "In the terminology of modern political science," says Khurshid Ahmad, "this word is used in the sense of absolute overlordship."[3] God is Omnipotent. According to Anwar A. Qadri, His sovereignty "is stated in the positive commands and precepts in the Qur'an."[4] The Holy Book is absolutely clear with respect to the sovereignty of Allah and there are a number of verses throughout the Qur'an in which His Sovereignty is described. We cite a few verses of the Holy Qur'an of this nature :

و لله ملک السموت و الارض والله علی کل شیٔ قدیر (3 : 189) -

[Unto Allah belongeth the sovereignty of the heavens and the earth. Allah is Able to do all things.]

ان الحکم الا لله ؕ امر الا تعبدوا الا ایاه ؕ ذلک الدین القیم (12 : 40) -

[The decision rests with Allah only, Who doth command you that ye worship none save Him. This is the right religion.]

قل اعوذ برب الناس o ملک الناس o اله الناس o (114 : 1-3) -

[Say : I seek refuge in the Lord of mankind, the king of mankind, the God of mankind.]

قل اللهم مالک الملک توتی الملک من تشاء و تنزع الملک ممن تشاء (3 : 26) -

[Say : O Allah : Owner of Sovereignty, Thou givest Sovereignty unto whom Thou wilt, and Thou withdrawest Sovereignty from whom Thou wilt.]

و لم یکن له شریک فی الملک (17 : 111) -

[And Who hath no partner in the Sovereignty.]

3. *Islamic Law and Constitution*, p. 108.
4. *Islamic Jurisprudence in the Modern World*, p. 270.

الا له الخلق و الامر (7 : 54) -

[His verily is all creation and commandment.]

والله یحکم لا معقب لحکمه (13 : 41) -

[الله حکم رانی کرتا ہے ' کوئی اس کے حکم کو ہٹانے والا نہیں ہے -]

While discussing the constituent elements of natural government, God and His Sovereignty and Prophethood, مولانا حامد الانصاری غازی maintains :

"خداوند عالم کو دنیا کے نظام اجتماعی پر ہمیشہ سے آج تک جو اقتدار حاصل رہا ہے تاریخ عالم کے ہر دور میں عقلائے زمانہ نے اس کو بڑی عقیدت کے ساتھ تسلیم کیا ہے - یہی اقتدار حکومت الٰہی کی اصل ہے لیکن دنیا کے عام مطمح نظر کے اعتبار سے اس اقتدار کو تسلیم کرنے کے بعد جو بات اہم تر ہے وہ یہ ہے کہ فطری حکومت کا تمام کام خدا کے ان پیغمبروں کے ہاتھوں میں آ کر مکمل تنظیم کی صورت اختیار کرتا ہے جن کی صداقت پر لا مذہب انسان بھی حرف نہیں لا سکتے - اسی بنا پر یہ کہنا آئینی واقعیت رکھتا ہے کہ حکومت الٰہی اور خلافت انبیاء دونوں ایک ہی تصور حکومت کے دو رخ ہیں -"[5]

The Maulana gives two fundamental principles of the Islamic political thought in the following words:

"اسلام کے نظریۂ سیاسی کا پہلا کلیہ یہ ہے کہ دنیا کی تمام حقیقتیں ایک حقیقت کبریٰ میں گم ہو جاتی ہیں - ہماری بوڑھی دنیا اپنے بچپن سے آج تک قدرت خداوندی کے ناقابل تردید طاقت ور اور ہمہ گیر منشا کے ماتحت مستقبل کے نامعلوم خطوط کی طرف آگے بڑھ رہی ہے - اللہ نے دنیا کو پیدا کیا ہے - اس کا ارادہ بلندی کے منشا سے دنیا پر حکومت کر رہا ہے - اس کی مرضی کچھ ایسے لوگوں کو چھانٹ لیتی ہے جو دنیا میں اس کے اقتدار اعلیٰ (sovereignty) کی نمائندگی کرتے ہیں اور دینی اساس

5. "اسلام کا نظام حکومت", p. 8.

پر دنیا کی تنظیم و ترقی میں خدا کے نائب کی حیثیت رکھتے ہیں -
"یہ اسلامی نظریہ کا دوسرا کلیہ ہے کہ ہر پیغمبر اپنے زمانہ میں خلیفۃ اللہ کی حیثیت سے امت کے منصب عظمیٰ پر فائز رہا ہے -"[6]

God is the paramount Power. مولانا حامد الانصاری غازی says :

"خدا کی حکومت کی بالا دستی کو ماننے کے معنی یہ ہیں کہ تمام دنیا ایک بالا دست وجود کے سایہ میں آباد ہے - تمام انسان انسانیت میں برابر ہیں - - - - حکومت اعلیٰ کا اختیار خدا کو حاصل ہے - اس اختیا ر میں شرکت کا دعویٰ سرکشی اور طغیانی ہے -"[7]

According to the teachings of the Qur'an, "God is the real ruler of the world, His Law is supreme, while man is His vicegerent" [27 : 62 : ویجعلکم خلفاء الارض] and of the human species. He appoints kings and magistrates whose important duty is to do justice according to the law and never to be led away by personal desire."[8] The commandment of the sovereign power will be enforced through a man who is His deputy.

مولانا محمد اسحاق سندیلوی says :

"یہاں پہنچ کر یہ مسئلہ خود بخود سامنے آ جاتا ہے کہ اسلامی حکومت میں اقتدار اعلیٰ کے احکام و قوانین کا نفاذ کس طرح ہو گا ؟ یا دوسرے الفاظ میں اِس کی خارجی شکل کیا ہو گی ؟ اس کا جواب لفظ خلافت میں پوشیدہ ہے - اسلام کے نزدیک انسان کا درجہ مخلوقات الٰہی میں سب سے اونچا ہے - مالک کائنات نے اپنی نیابت و خلافت کا تاج اس کے سر پر رکھا ہے جس کے معنی یہ ہیں کہ اللہ تعالیٰ کے احکام و قوانین دنیا میں نافذ کرنا اس کا کار منصبی ہے- قادر مطلق کے مقرر کردہ قوانین

6. Ibid.
7. Ibid., p. 266.
8. Sherwani, op. cit., pp. 23-24.

ساری کائنات پر حکومت کر رہے ہیں- کسی کی مجال نہیں کہ ان سے سرتابی کر سکے اور بجز حق تعالیٰ جل شانہ کے کسی کو ان میں تبدیلی کرنے کا اختیار نہیں ہے -"[9]

All the Prophets are the representatives of this political and legal sovereignty of Allah. The Qur'an says :

من یطع الرسول فقد اطاع اللہ (4 : 80) -

[Whoso obeyeth the messenger has obeyed Allah.]

وعد اللہ الذین آمنوا منکم و عملوا الصلحت لیستخلفنھم فی الارض کما استخلف الذین من قبلھم (24 : 55) -

[Allah hath promised such of you as believe and do good work that He will surely make them to suceed (the present rulers) in the earth even as He caused those who were before them to succeed (others).]

This verse enunciates two important constitutional principles :

(1) The correct status of an Islamic State is not that of a sovereign but that of a vicegerent.

(2) In an Islamic State, the powers of vicegerency are not vested in any one individual or family or group but in the whole Muslim community when it is blessed with the possession of an independent State.[10]

The same idea is amplified by Maulana Hamidul Ansari Ghazi in the following words :

"اسلامی حکومت کی عام حقیقت کا پہلا درجہ یہ ہے کہ وہ خدا کی بالا دست حکومت ہے' اس کا سر چشمہ خدا کا پیغام ہے اور اس کی حقیقت

9. "اسلام کا سیاسی نظام," p. 14.
10. Khurshid Ahmad, op. cit., p. 77.

خدا کے حکم میں مرکوز ہے ۔ حکومت دوسرے درجے میں ایک عظیم الشان نمائندگی اور نیابتی ذمہ واری (خلافت) ہے جو 'حکومت در حکومت' یا 'خدا داد حکومت' کے اصول پر اپنے حقیقی اقتدار کو ظاہر کرتی ہے' اس میں صحیح رہنمائی (امامت کبریٰ) کو زبردست دخل حاصل ہے اور اس کو صلاحیت مند انسانوں کی میراث ہونے کا شرف حاصل ہے۔ یہ حکومت ایک ایسے اقتدار و اختیار کو بروئے کار لاتی ہے جس کو انسان کے بہترین کاموں کا ثمرہ اور خدا کی نعمت کہنا موزوں ہے۔ اس کا تعلق معاہدۂ ربانی سے ہے۔ انسان ایک ازلی معاہدہ کی رو سے دنیا کے یگانہ خدا کی اطاعت کرتا ہے اور خدا اپنے وعدۂ بر حق کے مطابق اپنے بندوں کو حکومت عطا کرتا ہے ۔"[11]

The Modern View of Sovereignty and Its Criticism

The conception of State and sovereignty is distinct and unique in Islam. The feud between State and church is not found in Islam. There is no theocracy in Islamic State. God and man are two different entities. "This leads us to the conclusion that the concept of sovereignty in Islam precludes an absolute and non-responsible sovereign (as presented by Austin). It is far from the Hegelian theory of any other similar attitude of State and Government administration."[12]

Moreover, it will be useful to note the criticism on the modern view of Sovereignty by مولانا حامد الانصاری غازی :

"جدید نظریہ اور اس کی تنقید ۔ جدید نظریہ اقتدار اعلیٰ کی ان تمام خصوصیات کو تسلیم کرتا ہے جن کو صدہا سال قبل اسلام کے علماء اجتماعیات نے پیش کیا ہے ۔ جدید نظریہ قدیم نظریہ کی حرف بہ حرف

11. Op. cit., p. 244.
12. Anwar Ahmad Qadari, op. cit., p. 270.

پیروی ہے مگر اتنے فرق کے ساتھ کہ عصر جدید کے علماء نے صاحب اقتدار اعلیٰ کی ہستی کو بدل دیا ہے ۔

"وہ یہ تو مانتے ہیں کہ خدا نے ہر چیز کو پیدا کیا ہے اور یہ بھی اقرار کرتے ہیں کہ 'خدا نے انسانی فطرت کو بنایا اور حکومت عالم میں اس کی مرضی شریک ہے' لیکن یہ بھی کہتے ہیں کہ جدید علم السیاست خدا کے طریقوں پر گامزن نہیں ہے (نظریۂ سلطنت (بلنچلی) دور جدید کی سلطنت م ع ۱ باب ٦ ص ٦٣) ۔ اس سے معلوم ہوتا ہے کہ جدید نظریہ خدا کی بنائی ہوئی فطرت سے انکار کر کے اپنے عقلی رجحان پر اعتماد کرتا ہے ۔ عقل کی مجبوری مسلمہ شے ہے ۔

"علم السلطنت کے جدید ماہر یہ تسلیم کرتے ہیں کہ وہ اقتدار اعلیٰ کے لیے آزادی اعلیٰ منزلت عامہ جسے اہل رومہ جلالت (Magestas) کہتے تھے ' اختیارات عامہ کا عام اور وسیع ہونا ' سلطنت کے دائرہ میں سب سے بلند شے ہونا اور اپنے اقتدار میں وحدت کا مالک ہونا ضروری ہے ۔ لیکن اس کے ساتھ ہی مقتدر اعلیٰ کے تعین میں اختلاف پیدا ہو جاتا ہے ۔

"(۱) ایک رائے یہ ہے کہ سلطنت کی دائمی اور علی الاطلاق طاقت اقتدار اعلیٰ ہے یہ بودین (Bodin)[13] کا نظریہ ہے ۔ اس کو رواں الفاظ میں کہا گیا ہے کہ کسی مجموعی سلطنت کو اقتدار مطلق حاصل نہیں کیونکہ وہ خارجی طور پر دوسری سلطنتوں کی پابند ہے ۔

"(۲) دوسری رائے یہ ہے کہ سلطنت کا حکم ان (پادشاہ) اقتدار اعلیٰ کا مالک ہے ۔ لوئس چہارم ۱۷۹۳ع خود کو مقتدر اعلیٰ سمجھتا تھا ۔ ہنوور کے اعلان ۱۸۱۴ء میں مرقوم ہے کہ برطانیہ عظمیٰ کا بادشاہ اپنے اقتدار شاہانہ کا مالک ہے ۔

"انگلستان کے قانون میں تاج (بادشاہ کی ذات) مقتدر اعلیٰ ہے ' اگرچہ بادشاہ کے اقتدار کو مذہب سے تصدیق حاصل کرنی پڑتی ہے ۔ لیکن انگلستان کا شاہی اقتدار ایک ناقابل فہم شے ہے ۔ بادشاہ اپنے اقتدار اعلیٰ میں ازلی اور ابدی ہے ۔ بادشاہ کبھی نہیں مرتا ۔ بادشاہ عزت کا سرچشمہ

13. *Theory and Practice of British Government*, Chapters 1-3, pp. 1-27.

ہے ، مذہب اور حکومت کا مالک ہے ۔ ان خدائی اختیارات کی روح سے اصولاً بادشاہ کے حقوق تو بہت ہیں مگر وہ عملی طور پر تسلیم نہیں کیے جاتے ۔ صدیوں سے معطل چلے آتے ہیں ۔

"(۳) تیسرا نظریہ یہ ہے کہ برطانوی پارلیمنٹ کو اقتدار اعلیٰ حاصل ہے لیکن علمائے سیاست کے نزدیک یہ نظریہ زیادہ حقیقی نہیں ہے ۔ ۱۳۵۶ء میں لوئس نے ایک فرمان کی رو سے ووٹروں کو اقتدار اعلیٰ عطا کر دیا تھا ۔ اس کے یہ معنی ہیں کہ عوام اور ان کے منتخب ارکان ووٹروں کے محکوم ہیں ۔ اس عجیب سی بات کو تسلیم کرنا بھی آسان کام نہیں ہے ۔

"(۴) روسو کا نظریہ یہ ہے کہ مرضیٔ عامہ یعنی قوم کی عام خوشی اقتدار اعلیٰ ہے ۔ روسو نے غلطی سے مرضیٔ اعلیٰ کو اقتدار اعلیٰ بنا دیا ۔ مرضی کا اقتدار اعلیٰ ہونا مشکل ہے کیونکہ وہ فی نفسہ قانون بھی نہیں بلکہ قانون کا موجب ہے ۔

"مندرجہ بالا نظریوں کی تنقید کے جواب میں جدید دنیا سے خطاب کر کے حضرت یوسف کے الفاظ میں صرف یہ کہنا کافی ہے : 'دنیا کے قیدخانہ کے غلاموں انسانیت عامہ کے لیے ایک اقتدار اعلیٰ کو تسلیم کر لینا موجب اصلاح ہے یا قسم قسم کے بہت سے اعلیٰ اقتدارات کی الجھنوں میں گرفتار ہو جانا' (سورۂ یوسف) ۔

"قرآن کا فلسفہ یہ ہے کہ جب اقتدار کی حقیقی وحدت کو تقسیم کیا جائے گا تو روئے زمین پر فساد کا پیدا ہونا ناگزیر ہو گا ۔"

Democracy and Islamic System of Shura

Shura is an important institution in Islam. The Holy Prophet used to take resort to it. In the political and administrative affairs he consulted the Companions. As it is an expression of public opinion, so it has the legal status. A few examples of such historic meetings are given below :

(1) شورائے اذان ، (2) شورائے بدر الکبریٰ ، (3) شورائے اسارائے

(بدر کے جنگی قیدی) ، (4) شورائے اُحد ، (5) شورائے خندق ، (6) شورائے افک ، (7) شورائے حدیبیہ ، (8) شورائے اسیران ہوازن ، (9) شورائے معاذ بن جبل رض (حضور نے معاذ بن جبل کو گورنر یمن مقرر کرنے کے لیے شوریٰ طلب فرمایا) ۔

During the time of the Righly-Guided Caliphs, *shura* was also in vogue. 'Umar, the second Caliph, had two *shuras* : (*a*) *Shura Khass* and (*b*) *shura 'Amm*. The former consisted of eminent Companions and the latter was of the *Ummah*. He consulted both of them. "From the conventions of the Caliphs, nay, even from the conduct of the Prophet himself, the inferred rule is that the *Amir's* 'Consultative Assembly' (مجلس شوریٰ) is not to consist of his hand-picked men but only of those persons who enjoy the confidence of the masses. They should be such whose sincerity, ability and loyalty is above reproach in the eyes of the public and whose participation in the major decisions of the State would itself form guarantee of the fact that free and willing co-operation of the masses would be available to the State in the implementation of all the decisions thus taken."[14]

The following are the instances of this nature during the days of خلفائے راشدین :

(1) شورائے سقیفہ بنی ساعدہ ، (2) شورہ جیش اسامہ ، (3) شوریٰ مرتدین زکوۃ ، (4) دوسرا انتخابی شوریٰ (حضرت ابوبکر نے طلب فرمایا)، (5) شورائے محاز عراق (حضرت عمر نے طلب فرمایا) ، (6) شورائے میثاق بیت المقدس ، (7) شورائے محاصل عراق ، (8) شوریٰ جنگ نہاوند ، (9)

14. Khurshid Ahmad, Ed., *The Nature and Contents of Islamic Constitution*, p. 40.

تیسرا انتخابی شوریٰ ، (10) چوتھا انتخابی شوریٰ -

The Holy Prophet was enjoined upon to make use of *shura* in State affairs. The Qur'an says :

و شاورهم فی الامر (3 : 159) -

[And consult with them upon the conduct of affairs.]

Regarding it as a code of the Muslim collective action, the explanation is given in the following verse :

و امرهم شوریٰ بینهم (42 : 38) -

[And whose affairs are a matter of counsel.]

The practical working of the principle of "popular vicegerency" has also been described in the above-mentioned verse. Pointing out the true spirit of consultation the Holy Prophet says :

من اشار علی اخیه بامر یعلم ان الرشد فی غیره فقد خانه (ابو داؤد) -

[The man who gives a counsel to his brother knowing full well that it is not right does most surely betray his trust.]

مولانا حامد الانصاری غازی points out that :

"شوریٰ کے فیصلوں کو قانون اجماع کے ماتحت آئینی مرتبہ حاصل ہوتا ہے - شوریٰ کے فیصلے قانون اساسی کے مطابق ارتقائی حالات پر مبنی ہوتے ہیں - امت کے عام افراد اپنی رائے عامہ سے ان کو صورت وجود عطا کرتے ہیں اور اسلامی نظام اس پر کاربند ہو کر اپنے ارتقائی مدارج کو پورا کرتا ہے -"[15]

Again, he says :

"شوریٰ اسلامی حکومت کا خاصۂ لازمہ ہے اور امامۃ کبریٰ کے عہدہ کے لیے ایک لابدی وصف ہے جو کبھی اس سے جدا نہیں ہو سکتا - اس

15. "اسلام کا نظام حکومت," p. 296.

حکومت کی صحیح تعبیر کے لیے یہ کہنا قطعاً درست ہو گا کہ شوریٰ حکومت کی جان ہے بلکہ شوریٰ ہی حکومت ہے -"[16]

Mr H.K. Sherwani has put this idea in the following words :

"There is a place, and a very important one, for *Shura* or Counsel in the Qur'anic State. When the qualities of good Muslims are enumerated, when they are said to put their trust in God, when they are regarded as shunners of evil, when they are said to be brave defenders of their rights, they are also praised for taking others' counsel in time of need (Q. X/ii, 38). Not only that, but the Apostle, while he is enjoined to trust only in God when he has made up his mind, is also advised to consult even those who are enemies at heart. (Q. iii, 159). It is truly this democratic spirit, taking count of numbers as well as efficiency which made the religion of the Qur'an capable of converting the world, if not in so many words, at least so far as its main doctrines were concerned."[17]

Democracy means a government representing the general body of citizens, and also a government which is limited in its power over individual citizens. Before passing on to the criticism of democracy, it is desirable to point out some of its merits :

(1) This system of government has the spirit of compromise and agreement.

(2) It puts emphasis on self-help, initiative and individual responsibility.

(3) It elevates the masses, develops their faculties and stimulates their patriotism by allowing them a share in administration.

16. Ibid., p. 419.

17. Op. cit., p. 29.

(4) Democracy reduces the danger of revolution.

(5) It results in greater efficiency than any other form of government.

The evils of democracy are manifest. A few of them may be enumerated thus :

(1) Democracy brings the evils of party politics.

(2) It is a very expensive form of government.

(3) There is no moral value in it, e.g. bribery and corruption are its common abuses.

(4) There is a large mass of hasty and ill-digested legislation.

(5) Local interests tend to obscure and defeat the interests of the State at large.

(6) Democracy is the cult of incompetence.

(7) The people are short-sighted and do not see far enough in the future.

(8) It puts emphasis on quantity and not on quality.

(9) It is unfriendly to the growth of knowledge.

(10) It is opposed to liberty and individuality.

On the other hand, the Islamic system of *Shura* is a model for the whole world. By virtue of this system Muslims solved the knotty problems and affairs of the State in the early days of Islam. مولانا حامد الانصاری غازی says :

"اسلامی حکومت اپنے شوروی میلان اور سچے جمہوری اور پارلیمنٹری رجحان کے لحاظ سے تمام دنیا کے لیے ایک نمونہ اور معیار و منہاج ہے - افلاطون کے زمانے ۴۲۷ ق م سے لے کر انگلستان میں پارلیمنٹ کے زمانۂ قیام ۱۶۸۸ تک زمین کے کسی حصہ میں ایسی عظیم الشان پارلیمنٹ کا

پتا نہیں چلتا جو اسلام کے نظام شوریٰ کی طرح سادہ ہو، حقیقی ہو، بے قید ڈکٹیٹر شپ اور بے لگام سرمایہ دارانہ شہنشاہیت سے بے واسطہ و تعلق ہو - - - - موجودہ زمانہ تعمیر و ترقی کا زمانہ ہے - اس دور میں برطانیہ، فرانس اور امریکہ میں پارلیمنٹ کے قواعد کی زبردست نمائش ہوئی ہے، لیکن اس کے باوجود یہ کہنا آج بھی صحیح ہو گا کہ ہماری دنیا اسلام سے علیحدہ رہ کر کوئی ایسا پارلیمنٹری نظام قائم نہیں کر سکی جو شوریٰ کی طرح تمام دنیا کی بڑی پارلیمنٹ کی صورت اختیار کر سکتا اور اہل دنیا کو بغیر امتیاز اپنا گرویدہ بنا لیتا -"

Again, he has pointed out the outstanding qualities of *shura* as below :

"اسلام دنیا کی پہلی طاقت ہے جس نے موجودہ پارلیمنٹ سے ایک ہزار سال پہلے شوریٰ کے نام سے ایک سچے پارلیمنٹری نظام کی تشکیل کا کام اپنے ذمہ لیا - اسلام نے اس وقت اختیار عامہ کے اصول کی بنیاد رکھی جب یورپ کی تاریخ جہالت پر پانچ صدی کا زمانہ گزر چکا تھا - دنیا روم و فارس کی شہنشاہیتوں کے شکنجہ میں دبی ہوئی تھی اور ایشیا سے لے کر افریقہ تک اور افریقہ سے یورپ تک زمین کے کسی حصہ میں جمہوریت اور ڈیموکریسی (عمومیت) کا چمن سر سبز و شاداب نہ تھا -

"آرمینس وان میری نے بجا طور پر اعتراف کیا ہے کہ کائنات ارضی کے تمام مذاہب میں اسلام ہی ایک ایسا مذہب ہے جیسے ڈیمو کریسی (حقیقی جمہوریت) کی بنا پر امتیاز اور فوقیت حاصل ہے - انسان کی عمرانی تاریخ سے آج تک اگر صحیح معنی میں کوئی شوروی (پارلیمنٹری اور جمہوری) حکومت قائم ہوئی ہے تو بقسم یہ کہنا درست ہو گا کہ وہ خلفائے راشدین ہی کی خلافت راشدہ تھی - زمانۂ حال کی پارلیمنٹ غلط طریقہ پر اولیت کا شرف حاصل کرنا چاہتی ہے - موجودہ دنیا کی ترقی یافتہ قومیں بڑے رعب و داب کے ساتھ پارلیمنٹ کی معین تصویر اور اس کے قانونی طریقوں کی تکوین کا دعویٰ کرتی ہیں - یہ جزوی کام ہے جس کی کوئی بنیادی اہمیت نہیں ہے - اسلام کا دعویٰ ہے کہ وہ حقیقی پارلیمنٹ کا موجد ہے اور یورپ دوسرے درجہ کا کاریگر، کیونکہ شوریٰ دنیا کے

سامنے اس وقت آیا جب پارلیمنٹ زمین کے کسی حصہ پر پیدا نہیں ہوئی تھی -

"شوریٰ اسلام کی خلاقی کا اعلیٰ نمونہ ہے اور اپنی خصوصیات کے اعتبار سے مستقل ہے - سب سے اہم اور قابل ذکر بات یہ ہے کہ جو خرابیاں پارلیمنٹ کے نظام کی روح بن چکی ہیں اور ان کو شوریٰ کے نظام میں خوردبین کی امداد سے بھی نہیں دیکھا جا سکتا -"[18]

The difference between the Islamic *shura* and the parliament of the present time may be noted in the following words :

"(۱) معین قانون - شوریٰ ایک ایسے معین خدائی قانون کا پابند ہے جس کی اصل میں کوئی تغیر ممکن نہیں - پارلیمنٹری نظام میں قوم کی مطلق مرضی کو حکومت کی جان گنا جاتا ہے - شوریٰ میں یہ مرضی مطلق نہیں ہوتی بلکہ اقتدار اعلیٰ (اللہ تعالیٰ) کی مرضی کے تحت ہوتی ہے -

"(۲) ایوان - ریاست عامہ کی مجلس شوریٰ وحدانی پارلیمنٹ ہے - شوریٰ کے مختلف طریقوں میں سے کوئی طریقہ اختیار کیا جائے - اس پر ایوان واحد کا اطلاق ہو گا -

"(۳) رئیس الحکومت کی طاقت - شوریٰ کے نظام میں رئیس الحکومت کی ہستی ایک طاقت ور مرکز کی حیثیت رکھتی ہے - منصب امامت پر فائز ہونے کے بعد اس کا ہر قانونی حکم واجب التعمیل ہے - جب وہ حکومت کا عام کام سر انجام دیتا ہے تو رائے عامہ اور مفاد عامہ کا خیال رکھتا ہے، لیکن غیر معمولی حالات کے علاوہ اس کا ہر کام مضبوط حکمت عملی اور قوت کے ساتھ انجام پاتا ہے - اُمت کا ہر فرد ہر وقت اظہار رائے کے لیے آزاد ہے، لیکن جہاد و عمل کے میدان میں امیر کے احکام سے سرتابی نہیں کر سکتا - اس کے معنی یہ ہیں کہ ریاست عامہ کا رئیس ایک طاقت ور آمر تو ہے، آمر مطلق نہیں ہے، بلکہ اس کا مقام بے لگام جمہوریت اور بے قید ڈکٹیٹر شپ کے درمیان ہے -

"(۴) ترکیبی حیثیت - 'شوریٰ' مستقل، نمائندہ اور نیابتی ایوان نہیں

18. Op. cit., pp. 467-68.

ہے، اور نہ وہ انتخاب کے ان قوانین، طریقوں اور صورتوں کا پابند ہے جو سرمایہ دار شہریتوں اور جمہوریتوں کا طغرائے امتیاز ہیں اور جن کی رو سے بسا اوقات جمہور کی صحیح نمائندگی ناممکن ہو جاتی ہے -

"(۵) جماعت بندی - شوریٰ ایک متحدہ شیرازہ بند نظام ہے جس میں افراد آزادیٔ ضمیر کے ساتھ شریک ہو سکتے ہیں - شوریٰ کے ایوان میں مستقل جماعت بندی (پارٹی سسٹم) نہیں ہے، نہ بر سر اقتدار اکثریت ہے، اور نہ اقتدار سے محروم اقلیت، نہ مزدور، کسان اور غریب ہیں اور نہ اونچے نیچے طبقے ہیں، بلکہ وہ ایک متحدہ ایوان ہے جس کے ارکان تمام ذمہ داریوں میں یکساں شریک ہیں اور مساوی اقتدار کے مالک ہیں - ایوان کا اہم عنصر فرد ہے اور ایوان مجموعۂ افراد کا نام - فرد کو ضمیر اور رائے کی پوری آزادی حاصل ہے - ہر فرد ہر وقت رائے کا اظہار کر سکتا ہے اور مناسب مشورے سے کارگر بحث کا آغاز کر سکتا ہے - چونکہ فرد مشورہ دینے میں قوم کا امین ہوتا ہے اور اس کو اپنی سچی ذمہ داری کا احساس ہوتا ہے، اس لیے ایک فرد جماعت سے زیادہ اچھا کام کر گزرتا ہے - اس طرح جمہوریت کی سب سے بڑی خوبی عمومیت (ڈیما کریسی) بروئے کار آ جاتی ہے اور ایوان شوریٰ جمہوریت کی سب سے بڑی کمزوری غیر عادلانہ جماعت بندی سے محفوظ ہو جاتا ہے -

"(۶) عمومیت (*Democracy*) - عمومیت شوریٰ کے تعامل کی اساس ہے - اس نظام میں جبار شہنشاہیت کا کوئی وجود نہیں - شوریٰ کی حکومت میں نہ تاج ہے، نہ عرش سلطنت ہے، نہ شاہی دربار ہے، نہ شہنشاہ ہے، نہ شاہی شہزادے اور نہ سرمایہ دار اور جاگیردار -"[19]

Influence of Islam on Locke's and Rousseau's Theory of Sovereignty

It seems proper to analyse the theory of Sovereignty as presented by Locke and Rousseau.

Locke. Locke was a constitutionalist. He uses the word "supreme power" instead of sovereignty. He

19. Ibid., pp. 469-72.

places it in the hands of the people who are the ultimate source of all power. The people elect the legislature, which is also supreme, because it has to make laws for all parts of the State. The executive authority is subject to legislature, but when the legislature is not in session the executive may be called supreme. The theory of Locke will be clear from the following quotations from his two treatises on "Civil Government" :

"There can be but one supreme power, which is the legislature, to which all the rest are and must be subordinate, yet the legislature being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislature, when they find the legislature acting contrary to the trust reposed in them."

"When the legislature is not always in being, and the executive is vested in a single person who has also a share in the legislature, there that single person, in a tolerable sense, may also be called supreme; not that he has in himself all the supreme power which is that of law-making, but because he has in him the supreme executive from whom all inferior magistrates derive all their subordinate power."

Although he calls the Legislature and the Executive supreme in their limited spheres, yet the ultimate power rests with the people. In this sense, Locke may be called an upholder of Popular Sovereignty.

Rousseau. It is to Rousseau that the modern theory of sovereignty owes its immediate origin. It was he who conceived the sovereign as absolute, infallible, indivisible and inalienable. He believes that sovereignty belongs to the people or general will

and not to a king. His sovereign is a collective being, created by the Social Contract. He holds that it can never be alienated, because "power may be transmitted, but not the will." He is against the idea of dividing sovereignty. The English writer's theory absorbed the entire personality of the State in the Government, but Rousseau absorbed the Government in the people.

Both Locke and Rousseau believe that sovereignty ultimately rests with the people. By observing this conception it seems that they are influenced by Islam with respect to their theories of sovereignty. The State in Islam does not come into being as an end in itself but as a means for the righteous people to administer it. The Qur'an says :

و كذلک جعلنكم أمة وسطاً لتكونوا شهداء على الناس و يكون الرسول عليكم شهيدا (2 : 143) -

[Thus We have appointed you a middle nation, that ye may be witnesses against mankind, and that the messenger may be witness against you.]

This verse shows that the State is a representative of the community which is governed on behalf of God. Like Islam both of them are against placing sovereignty in the hands of any monarch, for a word of justice uttered before an unjust ruler is the greatest of *jihad* (*al-Hadith*).

It goes without saying that people are vicegerents in the universe. In fact, the people follow the commandments of God under معاهدۂ ازلی and He in accordance with His promise bestows upon them the

right of government.

The impact of Islam is evident from the right of sovereignty given to the people. In other words, both these political scientists took the *functional aspect* of sovereignty from the Islamic concept. Like Islam both of them despised monarchy. They believed in sovereignty through people. In Islam, State is *God's trust* in the hands of the people. Mr Justice Hamoodur Rahman, former Chief Justice of Pakistan, says :

"According to Islam all sovereignty vested in the Almighty and whosoever from amongst the human beings was selected by the people to perform any of those functions of sovereignty did so as a trust."[20]

The vicegerency belongs to the people with the conviction that they have to abide by the injunctions of the Qur'an and *Sunnah*.

When a lawgiver gives law, he has the will or intention behind it. It embodies the philosophy of its maker. This general will, as advocated by Rousseau, is exercised through people by means of different institutions. "In the language of Political Science, therefore, legal sovereignty without political sovereignty thus naturally means ownership of the authority of enforcing legal sovereignty."[21] Rousseau is the pioneer of the theory of Social Contract. Like Locke, he discarded the despotic rule and passed

20. "Concept of Administration of Justice," Magazine Section, *The Pakistan Times*, Lahore, dated 30 December 1973.

21. Khurshid Ahmad, Ed., op. cit., p. 13.

sovereignty to the people. Moreover, Rousseau's general will of the people and the Islamic principle of the consensus of juristic opinion are similar.

Independence of Judiciary

When Islam established its State in Medina according to Islamic principles, the Holy Prophet himself was the first *Qadi*. He performed the functions of a judge in accordance with Divine Laws. It was one of his duties to settle the disputes of the people. The Qur'an says :

انا انزلنا اليک الکتاب بالحق لتحکم بين الناس بما اراک الله - (105 : 4)

[Lo ! We reveal unto thee the Scripture with the truth, that you mayest judge between mankind by that which Allah showeth thee.]

و قل آمنت بما انزل الله من کتاب و امرت لاعدل بينکم (15 : 42) -

[But say : I believe in whatever Scripture Allah hath sent down, and I am commanded to be just among you.]

فلا و ربک لا يومنون حتی يحکموک فيما شجر بينهم ثم لا يجدوا فی انفسهم حرجاً مما قضيت و يسلموا تسليما (4 : 65) -

[But. nay, by thy Lord, they will not believe (in Truth) until they make thee judge of what is in dispute between them and find within themselves no dislike of that which thou decidest, and submit with full submission.]

"As long as Muhammad [peace be upon him] was alive he was naturally regarded as the ideal person to settle disputes," says N.J. Coulson.[22] The Prophet

22. *History of Islamic Law* (1964), p. 21.

believed in the supremacy of law. By his practice he established the example that even the Head of the State could be sued in his private as well as public capacity. The principle that "king can do no wrong" or Head of the State is above law is alien to the Islamic concept of justice.

The example set by the Prophet was followed by the Rightly-Guided Caliphs. His decisions proved a guiding light to the progress of Islamic *fiqh*. Islamic justice was at its peak during the time of the Prophet and the Caliphs. The *qadis* treated the rich and the poor alike. They had no distinction of the highest and the lowest. All were equal before law. 'Umar, the second Caliph, appeared before Qadi Zaid b. Thabit. He was requested by the *Qadi* to sit beside him. He declined and issued the following directions to all *qadis* of the Muslim Empire : (1) to treat all the persons equally in law ; (2) not to distinguish between relatives and others ; (3) to abstain from taking bribe.

Once 'Ali, the fourth Caliph, lost a coat-of-mail and found it with a person. The case went before Qadi Shuraih. 'Ali stood by the side of the accused.

During the early days of Islam the Head of the State was also the supreme head of the Legislature, the Executive and the Judiciary. The Holy Prophet and the Caliphs enjoyed the same status.

In Islamic judicial system disputes are settled by a *qadi* assisted by just witnesses as to points of facts and by *muftis* as to points of law. In fact, justice

is the mainstay of Islam. The Qur'an says :

يا ايها الذين آمنوا كونوا قوامين لله شهداء بالقسط ۖ ولا يجرمنكم شنان قوم على الا تعدلوا ۖ اعدلوا هو اقرب للتقوىٰ و اتقوا الله ۖ ان الله خبير بما تعملون (5 : 8) -

[O ye who believe ! be steadfast witnesses for Allah in equity, and let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to your duty. Observe your duty to Allah. Lo ! Allah is informed of what ye do.]

It is the independence and impartiality of the judiciary which guarantees the peace of a State and contentment among the people. The people cannot be satisfied if the courts are not free to administer justice. To curb the independence of the judiciary is a bad omen to the smooth working of the judicial system. The following remedies are suggested to cure this evil :

(1) The judiciary must be independent of the executive.
(2) The courts should have unlimited powers to summon every kind of evidence.
(3) It should be the discretion of the courts to hold a trial openly or *in camera*.
(4) All matters should be heard by the ordinary courts even though the high officials are involved.
(5) No one should be above law.
(6) Justice should be administered gratis.

Moreover, in modern times the independence of judiciary depends on three factors :

(1) The inducements offered to meritorious men.

(2) The methods of selecting them.

(3) Guarantees for the independence of the judges when appointed.

Scope of Legislation. There are two types of constitutions, viz. (1) written and (2) unwritten. The legislative authority under the unwritten constitution has unlimited scope. Its pertinent example is the Parliament of Great Britain. The sovereignty of the British Parliament may be exemplified thus :

(*i*) There is no law which Parliament cannot make.

(*ii*) There is no law which Parliament cannot repeal or modify.

(*iii*) There is under the English Constitution clear distinction between the fundamental or constitutional laws and the ordinary laws. Mr A.V. Dicey says :

"The Parliament has, under the English Constitution, the right to make or unmake any law whatever ; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[23]

If any limitation is conceivable on the legislature under the unwritten constitution, then that would be a product of the legislature itself. No outside agency can interfere by placing any fetter on the scope of such legislature. The case of written constitution, however, stands on a different footing. Hence the three agencies of the State, namely, executive, judi-

23 *Introduction to the Study of the Law of the Constitution,* pp. 39-40.

ciary and legislature, are marked out with the different scopes of operation in their respective spheres. These areas of operation are defined by the constitution in the form of subjects indicated in schedules. For instance, in the Government of India Act of 1935, there were three lists known as (*i*) Central, (*ii*) Provincial and (*iii*) Concurrent. Each list contained the subject on which the concerned legislature could legislate exclusively. In case of concurrent list, however, the position was that both the legislatures, namely, Central and Provincial, could legislate, but in case of repugnancy the Central law was to prevail. The same was more or less the position in the Constitution of 1956. In the Constitution of 1962, however, the position of the concurrent legislation was entirely different, that is, it could legislate only on the subjects indicated in the third list, but the provincial legislature was free to legislate on all other matters. In the Constitution of 1962 the position of the Constitution of 1956 more or less is repeated.

In case of Pakistan, however, there is a limitation placed on the powers of the legislatures by the constitution itself apart from the defined subjects in the list, namely, that no law can be framed which is repugnant to the Qur'an and *Sunnah*. As to who is to determine that repugnancy, is a different question. It can be conceived that if a piece of law is challenged before the court on the ground of its being repugnant to the Holy Qur'an and *Sunnah*, then it is

the constitutional duty of the court to find the repugnancy, and, if so, uphold the challenge.

Fundamental Rights. It is one of the duties of a State to protect the life, liberty and property of the people. "Without this guarantee," says Mr Khurshid Ahmad,

> "Nobody can feel secure against the high handedness of the executive and the feeling of constant insecurity cannot but breed discontent and even hatred against the Government itself. This, in its turn, will be most dangerous and harmful for the larger interests of national solidarity and sincere co-operation between the government and the people."[24]

The State should enforce the rule of law. Moreover, no one should be condemned unheard. The State must guarantee to all citizens the equality of status and opportunity in all walks of life. Mr Sharifuddin Pirzada says :

> "The political institutions and social structure rest on the theory that all men have certain rights of life, liberty and the pursuit of happiness which are unalienable, fundamental and inherent. When these 'unalienable' rights are protected by constitutional guarantees, they are called 'fundamental' rights because they have been placed beyond the power of any organ of the State, whether executive or legislative, to act in violation of them. They can be taken away, suspended or abridged only in the manner in which the constitution provides."[25]

The fundamental rights may be enumerated briefly as below :

24. *Islamic Law and Constitution*.

25. *Fundamental Rights and Constitutional Remedies in Pakistan* (1966), p. 4.

(*a*) Protection of life, liberty and property.
(*b*) Freedom of thought, expression, belief and worship.
(*c*) Freedom of movement, of trade, business and profession and the right to hold and dispose of property.
(*d*) Freedom of assembly and association.
(*e*) Equality of status and opportunity.

The Qur'an and Fundamental Rights. Dr Justice Javid Iqbal says :

> "In fact the fundamental, inalienable and residual rights of man were guaranteed in written form, under the Qur'an, long before the U.S. Constitution was conceived and even long before modern Western Civilization was born. To the Muslim, fundamental rights guaranteed to man under the Qur'an are secured. They cannot be obscured or eradicated by any moral power. The Islamic Law provides to each individual a full legal status, mainly because it is based on the principle of liberty and security of man. A Muslim individual can enjoy his rights under the Qur'an so long as he does not neglect or fail to discharge his duty to his fellow beings. His freedom is regulated in the common interest of the community as a whole."[26]

There are some verses of the Qur'an in which fundamental rights are hinted at :

Equality of Mankind

يا ايها الناس انا خلقنكم من ذكر و انثى و جعلنكم شعوبا و قبائل لتعارفوا ان اكرمكم عند الله اتقكم ان الله عليم خبير o (49 : 13) -

[O mankind ! lo ! We have created you male and female, and have made you nations and tribes that ye may know one

26. *Ideology of Pakistan*, p. 44.

another. Lo! the noblest of you, in the sight of Allah, is the best in conduct. Lo! Allah is Knower, Aware.]

كان الناس امة واحده (2 : 213) -

[Mankind were one Community.]

Freedom of Conscience

لا اكراه فى الدين (2 : 256) -

[There is no compulsion in religion.]

Freedom to All Religions

ان الذين آمنوا والذين هادوا والنصرىٰ والصبئين من آمن بالله واليوم الآخر و عمل صالحا فلهم اجرهم عند ربهم ولا خوف عليهم ولا هم يحزنون (2 : 62) -

[Lo! those who believe (in that which is revealed unto thee, Muhammad) and those who are Jews, and Christians, and Sabaeans, whoever believeth in Allah and the Last Day and doeth right—surely their reward is with their Lord, and there shall no fear come upon them, neither shall they grieve.]

Free Trade

يا ايها الذين آمنوا لا تاكلوا اموالكم بينكم بالباطل الا ان تكون تجارة عن تراض منكم (4 : 69) -

[O ye who believe! squander not your wealth among yourselves in vanity, except it be a trade by mutual consent.]

Rule of Law

و اذا حكمتم بين الناس ان تحكموا بالعدل (4 : 58) -

[And, if ye judge between mankind, that ye judge justly.]

اعدلوا هوا قرب للتقوىٰ (5 : 8) -

]Deal justly, that is nearer to your duty.]

Inviolability of Homes

يا ايها الذين آمنوا لا تدخلوا بيوتا غير بيوتكم حتى تستانسوا و تسلموا على اهلها (24 : 27) -

[O ye who believe! enter not houses other than your own without first announcing your presence and invoking peace upon the folk thereof.]

Injunction against Suspicion and Spying

يا ايها الذين آمنوا اجتنبوا كثير من الظن ان بعض الظن اثم ولا تجسسوا ولا يغتب بعضكم بعضا ايحب احد كم ان يا كل لحم اخيه ميتاً (49 : 12)-

[O ye who believe! shun much suspicion, for lo! some suspicion is crime. And spy not, neither backbite one another. Would one of you love to eat the flesh of his dead brother?]

No Liability for the Action of Others

ولا تزر وازرة وزر اخرىٰ (16 : 164) -

[Nor doth any laden bear another's load.]

Liberty

ان هذا امتكم امة واحدة و انا ربكم فاعبدون (21 : 92) -

[Lo! this, your religion, is one religion, and I am your Lord, so worship Me.]

The Holy Prophet and Fundamental Rights. The Prophet proclaimed: "People are all equal as the teeth of a comb." He preached freedom of speech and opinion. He said: "A word of justice uttered before an unjust ruler is the greatest of *jihad*." In

his "Farewell Pilgrimage," the Prophet said : "Then know that Allah has made the life, honour and property of a brother Muslim more sacred for you than this month, this day and this territory." Again, he said : "Be not unjust to others nor let injustice be done to you." He further said : "O men ! you have rights on your wives as they have rights on you." Continuing his Address he said : "An Arab has no superiority over a non-Arab, nor a white man any superiority over a coloured person. You are all the children of Adam and Adam was created from clay." Mr Sharifuddin Pirzada writes :

> "The Charters were granted and the Declarations were made by the Holy Prophet, early Caliphs and Muslim Generals whereby rights in the nature of fundamental rights were fully protected and guaranteed."[27]

Comments on the Constitutions of 1956 and 1962

Constitution of 1956. It was a constitution envisaging a parliamentary federal type of government. It was based on the pattern of Government of India Act, 1935. Another novel feature of this Constitution was that it was based on parity system between the two wings of the country. In terms of population, "Eastern Wing" had greater number of persons as compared with the "West Wing" ; nevertheless, as a measure of compromise a formula was evolved to provide equal representation to the two Wings in the National Assembly—a "Unicameral House".

27. Op. cit., p. 81.

The National and the Provincial Assemblies had each a five-year term, but it could be dissolved earlier.

Mr Muhammad Munir says :

> "There were two features original to this Constitution : (1) 'Fundamental Rights' and 'Directive Principles' of State Policy, (2) Islamic Provisions. The list of Fundamental Rights appeared to have been taken from the Indian and the United States Constitutions to the extent that if any existing or future law was found repugnant to such rights, it was to be considered as void."[28]

The Constitution for the first time recognised the "Fundamental Rights" of the citizens of Pakistan. It contained "Directive Principles" having Islamic bias in accordance with which the State structure was to be governed and conducted. Similarly, the Qur'anic law and *Sunnah* was recognised as Supreme Law and any statutory legislation inconsistent therewith was void and no law was to be framed or passed which conflicted with the Qur'anic injunctions and *Sunnah*. In short, it was a religiously tinged Constitution.

The National Assembly was a unicameral chamber and represented both the "Wings" in the ratio of 50 : 50. The Head of the State was to be the President and only a Muslim. "The executive authority," says Mr Munir, "vested in the President, but he was to act on the advice of the Prime Minister."[29] A leader of the majority party in the National Assembly was entitled to be called upon to form the

28. *Constitution of the Islamic Republic of Pakistan*, pp. 40-41.
29. Ibid., p. 53 .

Government and head the Cabinet as the Prime Minister of the country.

The legislative power was divided into three lists: the Federal, the Provincial and the Concurrent. It provided these lists in the form of schedules, which retained the subjects over which the Centre and the Provinces had the legislative authority. The third list entitled as concurrent list retained the subjects over which the Centre and the Provinces had the concurrent authority; but in case of conflict or overlapping, the Central law was to prevail.

The domain of three State organs, namely, executive, judicial and legislative, were markedly defined and the extent of their operation was determined. The judiciary was under obligation to enforce the "Fundamental Rights guaranteed to the citizens."

The Government of India Act, 1935, initially did not provide for Fundamental Rights, but in 1953 an amendment was made and Section 223-A was added and the High Courts were empowered to issue the named writs in the nature of *quo warranto*, *mandamus*, *certiorari prohibition* and *habeas corpus*, etc. This Section was declared as invalid in 1955 in the well-known case of Maulvi Tamizuddin by the Federal Court of Pakistan. The Constitution of 1956, however, provided for the named writs coupled with the orders and directions to be issued by the High Court, *vide* Article 170. By the issuance of the writs the High Courts were empowered to enforce

"Fundamental Rights".

The position of Government Servants was secured and any dismissal, reduction in rank or the removal or even a discharge in the nature of removal was safeguarded against. It was emphatically provided that no action envisaging the aforesaid contingencies could be taken with reasonable opportunity of being heard preceding such actions.

The Constitution of 1962. The pattern of this Constitution, though seemingly federal, was in substance unitary. It did not envisage parliamentary democratic government but provided for the so-called Presidential system which in fact was a glorified dictatorship. The system by which the representatives of the people were brought in the National Assembly was a novel one, that is to say, that there was an "Electoral College" consisting of 40,000 Basic Democrats representing each wing aggregating 80,000. The Basic Democrats were elected by the method of adult franchise. These Basic Democrats then in their turn elected the President and the members of the Central and Provincial Assemblies. The members of the Electoral College had to perform such other functions, particularly those relating to matters of self-government, as might be conferred on them by law.

The Central Legislature in the matters of "Money Bill" was absolutely impotent. It was the Presidential prerogative to pass and sanction the money to be charged on the Exchequer.

Initially it did not provide the "Fundamental Rights," but contained Directive Principles in relation to the State policy which the legislatures were obliged to observe in framing the laws. No law could be questioned in the Court of Law on the ground that it was derogatory to the principle of State policy. In 1963, however, "Fundamental Rights" were incorporated in the Constitution, but their amplitude did not have the scope as compared with the Constitution of 1956, because a number of provisos and riders were added thereto. These "Fundamental Rights" were again suspended in 1965 and never revived till the abrogation of this Constitution in 1969.

As regards the Writ Jurisdiction, the High Courts were conferred upon a power wider in scope than the one enjoyed under the Constitution of 1956. The Constitution of 1956 authorised the High Courts to issue named writs and those to specified persons and bodies, but the Constitution of 1962 authorised the High Courts to declare any order passed or action taken by any administrative, judicial, quasi-judicial body or the person to have been passed or taken without any lawful authority and of no legal effect. This was certainly an improvement on the earlier Constitution. Similarly, in the matter of Government servants the constitutional rights and guarantees enjoyed by them were considerably curtailed. Only the rights provided in the Constitution were declared to be enforceable and the rest did not enjoy

the constitutional guarantees.

In the "law-making" business the Central Legislature was to legislate only on the subjects particularised in the third list appended to the Schedule. In other matters, however, the Provincial Legislature had the authority to legislate. The Ordinance making powers of the President were not subject to the same amount of constitutional restrictions as under the Constitution of 1956, because the trend discoverable from the Constitution of 1962 was towards dictatorship concentrated in one man as President. The President, who must be a Muslim, is elected for a period of five years, but he is eligible for re-election. He is the Supreme Commander of the Defence Services and the executive authority of the Republic vests in him. Hence the division of power was jealously guarded against. It was, perhaps, for these measures that the Constitution of 1962 was not liked by the democratic-minded sections of the people. This Constitution also maintained the parity system between the two Wings.

Comparison. A comparative study of the two documents leads one to the conclusion that, apart from the larger power conferred on the High Courts, the Constitution of 1962 was a step towards retrogression in all material aspects in relation to the entire State policy. It denied the power of voting money bills to the peoples' representatives. It also denied the right of adult franchise to the people at large by providing an indirect system of election. It also

denied the constitutional rights and guarantees to the Government servants in all other respects barring a few items and also placed drastic restrictions on the Central Legislature in the law-making process. Firstly, it denied "Fundamental Rights" outright, but subsequent revival thereof survived only for a year or so and the citizens were constantly deprived of the democratic rights which they enjoyed under the Constitution of 1956. By providing for the so-called Presidential system it imposed a dictatorship and was an indirect denial of the rights which the Parliamentary system envisages.

The Constitution of 1956 had adopted a Parliamentary pattern. As the Constitution of 1962 was given by a single individual and not by a representative Assembly, it embodies, like other constitutions, the political philosophy of its maker. The Constitution of 1956, except in the matter of Writ jurisdiction, provided for almost all those rights and privileges which a democratic system visualised for the citizens. The abrogation of the Constitution of 1956 was relatable to the desire of those who did not want to have the people of this country enjoy the democratic rights and evolve the democratic institutions for their governance.

"A representative and reasonable Assembly is an essential and common feature of a democratic constitution, but indirect elections under the Constitution of 1962 fail to give full effect to the principle of responsibility and periodic accountability of the

elected Executive and Legislature." We can safely say that the Constitution of 1956 was corrective of and supplementary to the Government of India Act, 1935, but the Constitution of 1962 inflicted denial of all those constitutional and "Fundamental Rights" which only democratic institutions nurture. Hence the Constitution of 1962 can be termed to be nothing but an embodiment of reactionary measures.

Chapter 3

INTERNATIONAL LAW

Muslims, the First Writers on the International Law

The usages and customs of the pre-Islamic Arabia could not become an elaborated system. In the early days of Islam the term *siyar* (سير) was used to signify the law relating to war, peace and neutrality. We cite a few instances in its support :

ثم امر بلالاً آن يدفع اليه اللوآء فدفعه اليه ـ فحمد الله و صلى على نفسه ـ ثم قال : خذه يا ابن عوف ، اغزوا جميعاً فى سبيل الله فقاتلوا من كفر با الله ولا تغلوا ولا تغدروا ولا تمثلوا ولا تقتلوا وليداً ولا امرأة ـ فهذا عهد الله و سيرة نبيه فيكم ـ[1]

[Then the Prophet ordered Bilal to hand over the banner to him (to 'Abd al-Rahman ibn 'Awf). He did so. Then the Prophet eulogised God and asked for His mercy upon himself, then said : O Son of 'Awf ! take it. Fight ye all in the path of God and combat those who do not believe in God. Yet never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the behaviour of His Messenger for your guidance.]

و كانوا يصنمون فيها و يسيرون فيها بسيرة الملوک بدومة الجندل ـ[2]

[They used to give public feasts there and behaved there according to the behaviour of the Kings of Dumat al-Jandal.]

1. Ibn Hashim. *Sirat*. p. 992.
2. Ibn Habib, كتاب المحبر, p. 265.

ولهم على جند المسلمين الشركة فى الفى والعدل فى الحكم والقصد فى اليسرة ، حكم لا تبديل له فى الفريقين كلها ـ[3]

[The Muslim garrison shall concede to them a share in the booty, adroitness in Government and moderation in behaviour. This is a decision which neither of the contracting parties may change.]

It is clear from the above-quoted examples that in the pre-Islamic days as well as in the early period of Islam the conduct of the rulers, both in war and peace, was referred to by the term *Sirat*. Imam Abu Hanifah (d. 150 A.H.) is the first scholar who delivered lectures on Muslim laws of war and peace. These lectures were edited by his disciples of which "كتاب السير الصغير" and "كتاب السير الكبير" of ash-Shaibani (d. 189 A.H.), and of Ibrahim al-Fazari (d. 188 A.H.) are available. Imam al-Awza'i (d. 157 A.H.) criticised the opinions of Imam Abu Hanifah regarding *siyar*. Al-Awza'i's work is not available but a rejoinder to it by Imam Abu Yusuf, namely "الرد على سير الاوزاعى" has been edited. Dr Muhammad Hamidullah says :

"The term *sirat*, which linguistically signified conduct in general, acquired later the restricted sense of the conduct of the Prophet in his wars, and later still the conduct of Muslim rulers in international affairs."[4]

The Muslim scholars introduced international law. It is obvious that *siyar* was taught as a part of Islamic *fiqh* in all the Muslim institutions. This branch of law was developed and polished by Muslim

3. Ibn Sa'd, *Tabaqat*, 2/1, 32-33.
4. *The Muslim Conduct of State*, p. 13.

lawyers and historians. It was an independent subject. Dr Muhammad Hamidullah says :

"It is clear from this that the Muslims very early developed a science of International Law and, divorcing it from political science and general law, made it an independent subject. When we study the early Arabic works on International Law and allied subjects, we have a vivid idea of relations of the Muslims and the Rum (Byzantines) and others in time of war as well as peace, and we see how interaction was going on not only in the art of warfare but also in the very science of International Law. We come across, for the first time, the full-fledged notion of recognising rights for the enemy in all times, in peace as much as in war, rights endorsed by the Qur'an and by the practice of the Prophet and his successors It is also to be noted that books on *jura belli* (Laws of War) by Ayala and Vitoria, Gentiles and Grotius and others have no counterpart in the Roman and Greek literatures, and they are the product of an age when European erudition was not so highly developed as today. To us, therefore, they are but echoes of these Arabic works on *jihad* (War) and *siyar* (conduct in time of war and peace). There we seek for the link between the Roman and the modern periods, and there must we recognise the origin of the epoch-making change in the concept of International Law. And we see the role played by Islam in the world-history of International Law."[5]

Islam rendered a great service to the world with respect to the introduction of internationalism and humanism. It will be useful to cite a few lines by Mr H.K. Sherwani :

"When the Qur'anic principles were revealed, not only Arabia but the whole Arab was rent asunder by warring castes, nations and classes, and Islam struck a new note by preaching

5. Ibid., p. 69.

internationalism and humanism. It was an extremely bold advance."[6]

To sum up. Even as a separate and independent science "International Law" owes its origin to Arab Muslims of the Umayyad period, who divorced it from political science and law general, though not displacing it from its ethical bases.[7]

Theory of Nation in Islam

The modern law of nations is designed to regulate the relationship among the nations of different States. The law is not enforced by any superior nation-State but by members of the nations themselves. In the primitive days the States had coined rules and regulations for their application regarding the mutual relationship of States. The earlier systems of the law of nations were not worldwide in nature. Their sphere of operation was limited. They regulated the relationship of nations and civilisations within a limited sphere. Imam al-Shaibani says :

"Within each civilization a body of principles and rules developed for regulating the conduct of states with one another in peace and war. These systems, however, were not truly international in the modern sense, for each was exclusive and failed to recognize the principles of legal equality and reciprocity which are essential to any system if it is to become worldwide. The possibility of the various systems integrating into a single coherent system was virtuality nill."[8]

6. *Studies in Muslim Political Thought and Administration*, p. 33.
7. Op cit., p. x.
8. Shaibani, *Siyar*, Tr. by Majid Khadduri.

With the establishment of the Islamic State the need for conducting relations with non-Islamic States as well as with the non-Muslim citizens within the Islamic State was felt. To meet this need, Muslim jurists developed *siyar* into the Islamic law of nations. Islam provided a system of law which extended justice through the whole world. The Islamic law of nations ameliorated the sufferings of the people and established an organised world society.

The primitive nations, no doubt, had some form of laws for regulating their relationship with one another. They termed it as the law of nations. History tells us that the ancient Egyptians and Babylonians signed agreements with their neighbouring countries with respect to their problems for the use of water, settlement of frontier and the exchange of prisoners, etc. In the same way India, China and Christian countries also formulated similar systems for the regulation of their relationship with one another.

In the beginning the Islamic law of nations was a law which governed the conduct of war and division of booty. But by and by this concept was used in the broader sense which included in its ambit peaceful relations, making of treaties and movement of people from one State to another for commercial purposes, etc.

The theory of Islamic law of nations may be divided into three sub-heads.

(1) *The Islamic Concept of World Order.* For the reconstruction of an Islamic theory of the law of

nations this fact should be clear in one's mind that Islam is not a set of rituals but a code of life. It is also a political community (اُمت) gifted with Divine Law which enables this *Ummah* to regulate her relations with other nations of the world.

The main aim of Islam is to establish peace and order according to the norms of Islamic justice in the Islamic State and then extend its scope to the entire world. "The ideal aimed at by Islam is the establishment of a world government so as to remove all causes of international friction and wars. Each country would be free to pursue its national aims and aspirations, and would have complete autonomy in local affairs, and yet would be a unit in a larger whole. Islam does not, however, permit any compulsion or coercion for the achievement of this ideal and leaves it entirely to the will of the people of the different countries."[9] That is why from the very outset Islam entered into peaceful treaties with its neighbouring States with a set of rules and practices.

The Muslims are bound to observe the legal and ethical rules of Islam irrespective of their domicile in the Islamic or the alien territory. On the other hand, the non-Muslims residing in the Islamic State are not called upon to observe all the legal and ethical rules of Islam unless they themselves wish to avail of the Islamic justice. It is the duty of Islam to deal with the legal problems between Muslims and non-Muslims under International Law.

9. *Mizan*, Vol. II, No. 1 (March 1959), p. 11.

Under the Islamic International Law, the world is divided into دار الاسلام (Territory of Islam) and دار الحرب (Territory of War). One of the tests, as to whether a country should be treated as a *Dar al-Ḥarb* or *Dar al-Islam*, is whether or not congregational prayers on Fridays and 'Ids are held in the country.[10] Shafi'i jurists added a third temporary division called دار الصلح (Territory of Covenant) giving qualified recognition to non-Muslim communities if they entered into treaty with Islam. The Hanafi jurists do not recognise this last division. They argue that if the non-Muslims of a territory are on a peace treaty and pay tribute, then it becomes the part of *Dar al-Islam*. "The *Dar al-Islam*, in theory, was in a state of war with the *Dar al-Harb*, because the ultimate object of Islam was the whole world. *Dar al-Harb* (State of Nature) was not treated as no-man's-land. Its hostile relations with the *Dar al-Islam* were regulated with the Islamic law of war."[11]

(2) *The Doctrine of* Jihad. *Jihad* is an instrument which transforms *Dar al-Harb* into *Dar al-Islam*. The ultimate object of Islam is the universalisation of the Islamic faith and the establishment of God's sovereignty over the world. This object may be achieved through *jihad*. According to Shaibani, "the *jihad*, in the broader sense of the term, did not necessarily call for violence or fighting, since Islam might achieve its ultimate goal by peaceful as well as by

10 *Radd al-Muhtar*, III, 275.
11. Shaibani, op. cit.

violent means. It was accordingly a form of religious propaganda carried out by spiritual as well as by material means"[12] Islam is against all sorts of war except the religious one. Sir Abdur Rahim says :

"The *Imam* would be justified in declaring such a war against the non-Muslims of *Dar al-Harb* or an alien State for the protection of religion."[13]

The Holy Qur'an says :

فاقتلوا المشركين حيث وجدتموهم (9 : 5) -

[Slay the idolaters wherever ye find them.]

There is a tradition of the Holy Prophet on this subject also : "to fight polytheists until they say : There is no god but God."[14]

(3) *Conditions of Peace*. According to Islamic legal theory, there is a state of war between *Dar al-Islam* and *Dar al-Harb* until the later is overcome by the former. When *Dar al-Harb* disappears, the state of war ends and the supremacy of *Dar al-Islam* is acknowledged. The main aim of Islam is to procure peace instead of war. Mr H.K. Sherwani says :

"The application of this principle is according to the very essence of the Qur'an, for the two basic doctrines the Preceptor taught are couched in the two pithy terms, *Iman* and *Islam*, the one meaning the rule of peace and the other that of obedience."[15]

The non-Muslims living in *Dar al-Islam* enjoy the security of life and property and freedom of religion.

12. Ibid.
13. *The Principles of Muhammadan Jurisprudence* (1958), p. 392.
14. *Sahih Bukhari*, I, 111.
15. Op. cit., p. 25.

"Not only may the *Imam* enter into a treaty of peace with a non-Muslim State, but individual Muslim may afford protection to individual non-Muslim subjects of a non-Muslim State, in which case it will not be lawful for a Muslim to fight them. But should the *Imam* be of opinion that it is not expedient that those non-Muslims should continue to be under such protection, the protection will be withdrawn after notice has been given to them."[16]

Islamic Law of War

Definition of War. Al-Kasani defines *Jihad* thus: "*Jihad* in the technology of law is used for expending ability and power in fighting in the path of God by means of life, property, tongue and other than these."[17]

Jihad is not considered as a personal duty (فرض عين) to be observed by each and every individual (cf. فلولا نفر من كل فرقة منهم طائفة ليتفقهوا فى الدين (9 : 112) but only a general or collective duty (فرض كفايه). This fact renders the administration of *jihad* entirely in the hands of the Government. This practice of the Prophet also shows that either he himself organised the expeditions or delegated authority to responsible governors or tribal chieftains.[18] Abu Yusuf says:

لا تسرى سرية بغير اذن الامام -[19]

[No army marches without permission of the Caliph.]

16 *Hidayoh*, V, 210-13.
17. "بدائع الصنائع," VII, 97.
18 Ibn Hisham, p. 954.
19. "كتاب الخراج," p. 123.

A war cannot be waged without permission of the Caliph (Central Government).[20]

These and scores of other verses and traditions of the Prophet render military service an obligatory duty of every Muslim. Ordinarily, women and slaves are exempt, but if the rest of the man-power proves insufficient, even these are liable to active military service.[21] Regarding training and preparations in times of peace we read again in the Qur'an:

واعدو لهم ما استطعتم من قوة و من رباط الخيل ترهبون به عدو الله و عدوكم و آخرين من دونهم لا تعلمونهم ج الله يعلمهم و ما تنفقوا من شى فى سبيل الله يوف اليكم و انتم لا تظلمون و ان جنحوا للسلم فاجنح لها و توكل على الله - انه هو السميع العليم (8 : 60-61) -

Lawful Wars. The lawful reasons for Muslims to wage war may fall into the following categories:

(1) *The Continuation of an Existing War*

فاذا انسلخ الا شهر الحرم فاقتلوا المشركين حيث وجدتموهم و فذوهم احصروهم و اقعدوا لهم كل مرصد (9 : 5) -

(2) *Defensive*

و قاتلوا فى سبيل الله الذين يقاتلونكم ولا تعتدوا ط ان الله لا يحب المعتدين (2 : 190) -

Sanction

آذن للذين يقتلون بانهم ظلموا ط و ان الله على نصرهم لقدير (22 : 39) -

Examples. (1) Life in Medina after Hijrah. (2)

20. Mawardi, "الاحكام السلطانيه," p. 53.
21. "فتاوىٰ تاتار خانيه," Chapters on *Jihad*, etc.

Expedition against دومة الجندل in 5 A.H. when the local chieftain (اوكيدا) was molesting the caravans coming from the north to Medina. (3) The attack on Khaibar is an instance of nipping war in the bud.

الا تقاتلون قوماً نكثوا ايمانهم و هموا با خراج الرسول و هم بدوء و كم اول مره اتخشونهم فالله احق ان تخشوه ان كنتم مومنين (9 : 73) -

An important saying of the Prophet enumerates the kinds of defensive wars and says :

"Whoever fights in defence of his person and is killed, he is a martyr, whoever is killed in defence of his property is a martyr, whoever fights in defence of his family and is killed is a martyr, and whoever is killed for the cause of God is a martyr."[22]

(3) *Sympathetic*

والذين آمنوا و لم يهاجروا مالكم من لايتهم من شى حتى يهاجروا و ان استنصرو كم فى الدين فعليكم النصر الا على قوم بينكم و بينهم ميثاق والله بما تعملون بصير (8 : 72) -

و مالكم لا تقاتلون فى سبيل الله و المستضعفين من الرجال و النساء والولدان الذين يقولون ربنا اخرجنا من هذه القرية الظالم اهلها و اجعل لنا من لدنك ولياً و اجعل لنا من لدنك نصيرا - الذين آمنوا يقاتلون فى سبيل الله والذين كفروا يقاتلون فى سبيل الطاغوت فقاتلوا اولياء الشيطن ان كيد الشيطن كان ضعيفاً (4 : 75-76) -

(4) *Punitive.* The following causes constitute lawful reasons for waging war, viz. (*i*) Hypocrisy ;

يا ايها النبى جهد الكفار و المنفقين و اغلظ عليهم و ما واهم جهنم و بئس المصير (66 : 9) -

(*ii*) Apostasy, insisting on thenon-binding charac-

22. *Suyuti.*

ter of *Zakat* (that is refusing to pay taxes) or any other religious duty, "rebellion".

و ان طائفتن من المومنين اقتتلوا فاصلحوا بينهما فان بغت احداها على الاخرى فقاتلوا التى تبغى حتى تفىٔ الى امرالله فان فآءت فاصلحوا بينهما بالعدل و اقسطوا ان الله يحب المقسطين (49 : 9) -

(*iii*) Breaking of a covenant by the other party,

و ان نكثوا ايمانهم من بعد عهدهم و طعنوا فى دينكم فقاتلوا ائمة الكفر انهم لا ايمان لهم لعلهم ينتهون (9 : 12-13)

becoming a Kharijite, because such people say that the rest of the Muslim community is apostate and take up arms against the established government.

(5) *Idealistic.* It means in the path of God (فى سبيل الله) The Qur'an says :

هو الذى ارسل رسوله بالهدى و دين الحق ليظهره على الدين كله ولو كره المشركون (9 : 33) -

كنتم خير امة أخرجت للناس تامرون بالمعروف و تنهون عن المنكر و تومنون بالله (3 : 109) -

Hadith. "Whoever among you sees an indecency, he must change it by his hand ; if he cannot, he must do so by his tongue ; if he cannot, he must do so by his heart (through disapproval, etc.), but this last would testify to the extreme weakness of faith."[23]

It is well known that the Qur'an says لا اكراه فى الدين. Dr Hamidullah says :

"The whole life of the Prophet shows that he sought liberty to preach his message. In his defensive or punitive wars, when

23. *Sahih* of Muslim, I, 50.

he predominated, he compelled nobody to embrace Islam, but tolerated non-Muslims, Christians, Jews, Parsis in particular, as subjects of the State."

Jihad is said to be good not in itself (حسن لعينه), but for the sake of something else (حسن لغيره), namely, religion. *Jihad* is permitted for the protection of Islam and is limited by such necessity. This is in the first place apparent from the fact that the *Imam* is allowed to enter into treaty of peace with the hostile State if such a treaty would secure the prevention of the evil to be avoided.[24] Then, no such war can be waged unless the non-Muslim subjects of the hostile State have first of all been invited to embrace Islam; and if they accept such invitation, hostilities are to cease at once. If they refuse to accept Islam but accept the suzerainty of Islam by agreeing to pay a poll-tax (جزيه) to the Muslim State, in that case also hostilities must cease as there would be no more likelihood of danger to Islam. Consequently, such non-Muslims will enjoy all the rights in respect of their lives and property like Muslims.[25]

Nature of War. Muslims think of war only as unavoidable, not as desired or to be sought after. The Qur'an says :

و ان جنحوا للسلم فاجنح لها و توكل على الله (8 : 61) -

[And if they incline to peace, incline thou also to it and trust in God.]

فلا تهنوا و تدعوا الى السلم و انتم الاعلون والله معكم ولن يتركم

24. *Hidayah*, V, 200-05.

25 Sir Abdur Rahim, op. cit., p. 293,

اعمالكم (47 : 35) -

[So do not falter and cry out for peace, ye (will be) the uppermost and Allah is with you, and He will not grudge (the reward of your actions.]

A *hadith* of the Prophet goes :

"Do not be eager to meet the enemy but ask God for safety. Yet if you meet them, persevere and have patience; and know that Paradise is under the shadow of swords."[26]

عن عبدالله بن ابى اوفى ان رسول الله صلى الله عليه و آله وسلم قال و اعلموا ان الجنة تحت ظلال السيوف -[27]

"The underlying idea of *jihad* is to maintain the predominance of the power or the balance of power as it is euphemistically called in modern European diplomacy," says Abdur Rahim.[28]

Acts Forbidden. In actual fight the following acts are forbidden to a Muslim army as regards enemy persons and property :

(1) Unnecessary, cruel and tortuous ways of killing.

(2) Killing non-combatants (women, minors, servants, slaves, blind, those incapable of fight, etc.)

(3) Prisoners of war are not be decapitated.

(4) Mutilation of men as well as beasts.

(5) Treachery and perfidy.

(6) Devastation, destruction of harvest, cutting trees unnecessarily.

(7) Slaughtering animals more than what is necessary for food.

(8) Excess and wickedness.

26. Bukhari.

27. "جواہر البخاری," p. 333.

28. Sir Abdur Rahim, op. cit., p. 393.

(9) Adultery and fornication.

(10) Killing enemy hostages.

(11) Severing the head of some fallen enemy and sending it to higher Muslim authorities is regarded as improper and disliked (مکروہ). The first Caliph issued orders forbidding it.

(12) Massacre.

(13) Killing parents.

(14) Killing peasants when they do not fight.

(15) Killing traders, merchants, contractors and the like, if they do not take part in actual fighting.

عن جابر قال کانوا لا یقتلون تجار المشرکین ۔[29]

(16) Burning a captured man or animal to death.

(17) Acts forbidden under treaties.

Acts Permitted.

(1) If the enemy is absent, ambush may be laid for him. If he is present, yet out of reach, he may be besieged.

و خذوھم و احصروھم واقعدوا لھم کل مرصد (9 : 5) ۔

(2) Recourse might be had to ruses.

(3) Propaganda.

(4) The enemy might be attacked with all kinds of weapons.

و اعدوا لھم ما استطعتم من قوۃ (60 : 15) ۔

(5) Assassination, for diminishing greater bloodshed.

(6) Night attacks.

(7) Unintentional killing of non-combatants is exempt from punishment.

(8) Enemy property may be destroyed or captured.

(9) Water supply of the enemy may be cut off or in some other way made unusable.

(10) Food and fodder may be obtained from the enemy country.

(11) Individuals or locality may collectively be fined or

29. Abu Yusuf, op. cit., p. 122.

otherwise punished for indiscipline or hostility to the occupying forces. The general principle may help to a great extent that everything not prohibited is premissible (الاصل الاباحۃ), that is "Originally everything is lawful."

End of War. A war may be ended in one of the following ways :

(1) Without any mutual agreement and without defining the length of the duration of peace like the Battles of Badr, Uhud and Khandaq.

(2) The non-Muslim enemy embraces Islam.

(3) Defeat of the enemy and annexation of their territory.

(4) Acceptance by the enemy of the overlordship or suzerainty of the Muslim State.

(5) Setting the differences in a treaty of peace.

The Law of Treaty

Nature of the Treaty of Peace. The treaty of peace ensures future friendship, alliance and co-operation according to its terms and conditions. Sometimes it is helpful in the cessation of hostilities and the creation of congenial atmosphere between the warring States. Al-Shaibani says :

"The treaties were regarded as temporary arrangement while the state of war was regarded as the normal relationship between the *Dar al-Islam* and *Dar al-Harb*."[30]

So it is impossible to contract a treaty of perpetual alliance with non-Muslims. Dr Muhammad Hamidullah says :

"The Prophet concluded pacts of mutual assistance with pagan tribes around Madinah. In all the treaties of the early

30. Shaibani, *Siyar*, Tr. Majid Khadduri.

days of the Muslim State, there is no time limit. In the treaty of Hudaibiyah alone we come across the mention of the terms 'ten years' during which the treaty would operate."[31]

It is the duty of the *Imam* to consider as to whether the treaty is beneficial to the Muslims or not. It is, however, the welfare or the betterment of the Muslims which matters. Mr Abdur Rahim says :

"Such a treaty is regarded as carrying out the real aim of *Jihad* which is to ward off injuries likely to be inflicted by non-Muslims. It is assumed that the *Imam* is to enter into a treaty only for the good of Muhammadans."[32]

If in the duration of a treaty the head of Islamic State thinks it fit to withdraw from it, he can do it provided he gives a notice of this intention to the other party. In case the other violates the conditions of a treaty the *Imam* is not bound to give such a notice.

The other aspect of the treaty of peace may be visualised in the following verses of the Qur'an :

(۱) یا ایها الذین آمنوا لا تتخذوا الیهود و النصری اولیاء بعضهم اولیآء بعض ط و من یتولهم منکم فانه منهم ط ان الله لا یهدی القوم الظلمین (5 : 51) -

(۲) انما ولیکم الله و رسوله و الذین آمنوا الذین یقیمون الصلوة و یوءتون الزکوة و هم راکعون o و من یتول الله و رسوله و الذین آمنوا فان حزب الله هم الغلبون o یآیها الذین آمنو لا تتخذوا الذین اتخذوا دینکم هزوا ولعباً من الذین آوتوالکتب من قبلکم والکفار اولیاء و اتقوا الله ان کنتم مومنین (5 : 55-57) -

یآ ایها الذ ین آمنوا لا تتخذوا آباء کم و اخوانکم اولیاء ان استحبوا

31. Op. cit., p. 268.

32. Op. cit., p. 394.

الکفر علی الایمان و من یتو لهم منکم فاؤلئک هم الظلمون (9 : 23) -

(۳) براءة من الله و رسوله الی الذین عاهدتم من المشرکین o فسیحوا فی الارض اربعة اشهر و اعلموا انکم غیر معجزی الله و ان الله مخزی الکفرین (9 : 1-2) -

Effects of a Treaty of Peace

(1) The subject over which hostilities had broken out is settled.

(2) The rights of belligerency, i.e. killing, capturing, plundering and occupying, etc., are brought to an end.

(3) Unless otherwise provided in the treaty, the *status quo* before the conclusion of the treaty will be maintained.

(4) Prisoners of war are exchanged or otherwise released.

(5) As soon as peace is concluded, the treaties suspended during the war, and which require no renewal, automatically revive and treaties dealing with behaviour during the war are suspended.

Elements of Treaty

(1) Treaty must be in writing. The Qur'an says :

اذا تدا ینتم بدین الی اجل مسمی فا کتبوه (2 : 282) -

[When ye contract a debt for a fixed term, record it in writing.]

(2) The date of the writing of the treaty and the date on which it comes into force.

(3) Duration of the treaty.

(4) Promises for the observance and execution of the treaty.

(5) Signatures of the duly authorised persons.

(6) The sanction for execution, such as hostages, etc.

(7) Along with the main treaty, sometimes annexes, supplements, provisos and even secret sections are also to be found.

Amendment of Treaties. Treaties may be amended

in part at any time by mutual consent of the parties.

Denunciation of Treaties. Due to the changed circumstances the condition of treaty may be revised. The *Imam* can do so, but only after giving sufficient notice of his intention to the other party, otherwise it would be an act of treachery which the law forbids. If the other party violates the treaty, it is not necessary for the *Imam* to give a formal notice before taking action.

The Law of Neutrality

The pre-Islamic and early Islamic Arabs used the term "*i'tizal*" (اعتزال) for neutrality. In modern terminology it is signified as *hiyadah* (حيادة). The conception of neutrality was common among the Arabs, e.g. the Treaty of Neutrality between Emperor Decius (d. 251 C.E.) and Ghassanid prince of Syria, and mention of neutrality in the War of Basus between the tribes of Bakr and Taghlib.

There are cases and treaties of neutrality during the time of the Holy Prophet and the Rightly-Guided Caliphs. We explain only two cases of such nature.

(1) The allied tribes of Banu al-Nadir and Ghatafan secured the promise of alliance from Banu Quraizah. In 4 A.H. Banu al-Nadir, violating the terms of treaty, refused to contribute towards the blood-money of some of the allies common to them and Muslims. They were besieged. Banu Quraizah and Banu Ghatafan remained neutral and rendered no

help to the Banu al-Nadir.[33]

(2) Jarud's tribe, Abd al-Qais, remained loyal to Islam and was neutral in the struggle between the Muslims of Bahrain and the rest of the tribe of Rabi'ah.[34]

There are numerous treaties of neutrality or documents which indicate neutrality in the early days of Islam. A few of them are quoted here :

(*a*) The Holy Prophet entered into treaty with the non-Muslim Arab tribes living around Medina especially on the caravan route of the Meccans to and from Syria.

(*b*) Treaty with Banu Ghifar (a tribe near the Red Sea).

(*c*) A treaty of alliance and neutrality with Banu Abd ibn 'Adiy in 5 A.H.

(*d*) The famous treaty of Hudaibiyah. It also contains the provision of neutrality.

It will be interesting to view the laws of neutrality according to jurists. From the above facts it is evident that the early Muslims were aware of the term "neutrality". It does not go without saying that the laws of neutrality were not so elaborate in those days as in the modern times. The laws of neutrality may be condensed into the rights and obligations of neutrals *vis-a-vis* States actually engaged in a war. Imam Sarakhsi has discussed this subject at full length. For instance, he says :

33. Ibn Sad, op. cit., I/2. p. 41.
34. Tabari, *Ta'rikh*, p. 1990.

"Regarding the enemy ship with goods, and neutral ship with enemy goods, our authors lay down a general principle that the safety of the owner renders the property safe (حرمة الملک باعتبار حرمة المالک).

The relevant verses of the Qur'an may be enumerated thus :

(۱) الم تر الی الذین نافقوا یقولون لاخوانهم الذین کفروا من اهل الکتاب لئن اخرجتم لنخرجن معکم ولا نطیع فیکم احدا ابدا وان قوتلتم لننصرنکم ط واللہ یشهد انهم لکذبون o لئن اخرجوا لایخرجون معهم و لئن قوتلوا لا ینصرونهم ولئن نصروهم لیولن الادبار ثم لا ینصرون (59 : 11-12) -

In these verses it is predicted that the hypocrites among the inhabitants of Medina would not help their friends (the Jews of Banu al-Nadir), but would remain neutral in case of fight with the Muslims.

The Muslims are advised to take care of certain tribes who had remained neutral and had not helped the enemies of Islam in their fight against the Muslims. They took drastic action against those who violated their neutrality.

(۲) الا الذین عاهدتم من المشرکین ثم لم ینقصوکم شیئاً و لم یظاهروا علیکم احداً فاتموآ الیهم عهدهم الی مدتهم ط ان اللہ یحب المتقین (9 : 4) -

(۲) لا ینهکم اللہ عن الذین لم یقاتلوکم فی الدین و لم یخرجوکم من دیارکم ان تبروهم و تقسطوا الیهم ط ان اللہ یحب المقسطین o انما ینهکم اللہ عن الذین قاتلوکم فی الدین و اخرجوکم من دیارکم و ظاهروا علی اخراجکم ان تولوهم و من یتولهم فاولئک هم الظلمون (60 : 8-9) .

The Contribution of Islam to the Internationalising of Human Society

"Islam has discarded, from the very beginning,

differences of race and colour, country and language, in favour of the universal brotherhood of the Faithful," says Dr Muhammad Hamidullah.[53] For instance, the Qur'an says :

(1) انما المومنون اخوة فاصلحوا بین اخویکم واتقو اللہ لعلکم ترحمون (49 : 10) -

(2) واعتصموا بحبل اللہ جمیعاً ولا تفرقوا و اذکروا نعمت اللہ علیکم اذ کنتم اعدآء فالف بین قلوبکم فاصبحتم بنعمة اخواناً و کنتم علی شفا حفرة من النار فانقذکم منها کذلک یبین اللہ لکم آیته لعلکم تهتدون (3 : 102) -

(3) واطیعوا اللہ و رسوله ولا تنازعوا فتفشلوا و تذهب ریحکم واصبروا ان اللہ مع الصبرین (8 : 46) -

(4) ان هذه امتکم امة واحدة و انا ربکم فاعبدون (21 : 92) -

The unity and brotherhood described in the Qur'an joined the hearts of enemy tribes. The Muslims were enjoined upon to hold the rope of God tightly and never to separate. Mr H.K. Sherwani says :

"The social reforms are interspersed throughout the Book, and they were not put forward merely as ideals, but the proud Arabs were made to practise them. Thus the nomads of desert were transformed into great statesmen, generals, merchants, kings and emperors, and made superior even to those who boasted a civilization dating back to thousands of years."[36]

Besides safeguarding the individual rights and liberties, Islam is a pioneer of the collective welfare of the people. The institution of *zakat*, the estab-

35. Op. cit , p. 43.

36. Op. cit., pp. 28-29.

lishment of *Bait al-Mal*, *Hajj* and *khilafat* are its examples.

Brotherhood of Man. A few typical quotations of this nature are given from the Qur'an :

(*a*) *Creation of mankind from the same couple* :

يا ايها الناس اتقوا ربكم الذى خلقكم من نفس واحدة و خلق منها زوجها و بث منها رجالاً كثيراً و نساء (4 : 1) -

يا ايهاالناس انا خلقنكم من ذكر و انثىٰ و جعلنكم شعوبا و قبائل لتعارفوا ان اكرمكم عند الله اتقكمؕ ان الله عليم خبير (49 : 13) -

(*b*) *Mankind is one community* :

كان الناس امة واحدة (2 : 213) -

و ما كان الناس الا امة واحدة فاختلفواؕ ولولا كلمة سبقت من ربك لقضى بينهم فيما فيه يختلفون (10 : 19) -

(*c*) *Islam is universal* :

و ما تسئلهم عليه من اجرؕ ان هو الا ذكر للعلمين (12 : 104) -

و ما ارسلنک الا كافة للناس بشيرا و نذيرا و لكن اكثر الناس لا يعلمون (34 : 28) -

و ما ارسلنک الا رحمة للعلمين (21 : 107) -

(*d*) *Difference of colour and language explained* :

و من آية خلق السوات والا رض و اختلاف السنتكم و الوانكمؕ ان فى ذلک لآيت للعلمين (30 : 22) -

انا خلقنكم من ذكر و انثىٰ و جعلنكم شعوبا و قبائل لتعارفوا (49 : 13) -

(*e*) *Toleration* par excellence :

ان الذين آمنوا والذين هادوا و النصرى و الصبئين من آمن بالله واليوم الاخر و عمل صالحاً فلهم اجرهم عند ربهم ولا خوف عليهم و لا هم يحزنون (2 : 62) -

ان الذين امنوا والذين هادوا والصبئون والنصرى من امن بالله واليوم الاخر و عمل صالحا فلا خوف عليهم ولا هم يحزنون (5 : 69) -

قل يا اهل الكتب تعالوا الى كلمة سوآء بيننا و بينكم الا نعبد الا الله ولا نشرک به شيئاً ولا يتخذ بعضنا بعضاً اربابا من دون اللهؕ فان تولوا فقولوا اشهدوا بانا مسلمون (3 : 63) -

Prisoners of War and Slavery

This subject has two parts : (1) Muslim prisoners; (2) enemy prisoners.

Muslim Prisoners. A Muslim prisoner is bound to observe faithfully his parole and honour. If, however, he had been given no parole, he is at liberty, if he likes and is able, to escape or otherwise do harm to his captors.[37]

As regards Muslim subjects, it is the duty of the Muslim State to ask their release by giving money from the treasury.[38] The Qur'an says :

انما الصدقت للفقرآء والمسكين والعملين عليها والمولفة قلوبهم و فى الرقاب والغرمين و فى سبيل الله و ابن السبيلؕ فريضة من اللهؕ والله عليم حكيم (9 : 60) -

The Tradition of the Prophet goes : "Manage the release of the prisoners" (فكوالعانى).[39]

During the days of the Holy Prophet no ransom was paid for the release of any Muslim prisoners. The Caliph 'Umar, however, ordered "every Muslim prisoners in the hands of non-Muslim must be re-

37. مرخسى, "شرح السير الكبير," IV, p. 223.
38. Abu Yusuf, op. cit., p. 121. 39. Bukhari, 56 : 171.

lieved by means of the Muslim State treasury.[40]

Enemy Prisoners. A prisoner cannot be killed for a prisoner. This was also the practice of the Companions.[41] But in special cases the prisoners may be tried and punished, e.g. two prisoners of the Battle of Badr were beheaded by the order of the Prophet for their crimes beyond rights of belligerency and bitter enmity against Islam.[42] According to Muslim jurists, prisoners cannot be held responsible for mere acts of belligerency.[43]

Treatment during Captivity. (1) Regarding the prisoners of the Battle of Badr, the Prophet ordered: "Take heed of the recommendation to treat the prisoners fairly" (استوصوا بالا ساری خیراً).[44]

(2) Prisoners must be fed and well treated until a decision is reached regarding them.[45]

(3) They are not to be charged for their food. The Qur'an says:

و یطعمون الطعام علی حب مسکیناً و یتیا و اسیرا (76 : 8) -

[And feed with food the needy wretch, the orphan and the prisoners, for love of Him.]

(4) Prisoners should be protected from heat and cold and the like. They should be provided with clothes.[46]

(5) If they are in trouble they should be relieved

40. Abu Yusuf op. cit., p 121.
41. Ibn Rushd, "بداية المجتهد," I, 351.
42. Ibn Hisham, p. 458.
43. Dabusi, *Asrar*, fol. 148 a.
44. Tabari, *History*, I, 1337-38.
45. Abu Yusuf, op. cit.
46. Bukhari, 56 : 142.

of it (*Ḥadith*).[47]

(6) A prisoner may bequeathe his property at home.[48]

(7) A mother is not to be separated from her child nor other relatives from each other.[49]

(8) The status of the prisoners should be respected. The Traditions of the Prophet may be referred to on this point: "Pay respect to the dignitary of a nation who is brought low."

(*a*) ارحموا عزیز قوم ذل -[50]

(*b*) اذا اتا کم کریم قوم فا کرموه -[51]

[When a dignitary of a nation is brought before you pay respect to him.]

(9) If the prisoners break the discipline, they might be chastised.

(10) In case they escape from the prison and are recaptured their previous offence of escaping might not be the ground for punishment, except the breach of parole.

It depends upon the discretion of the commander to decide the fate of the prisoners. They may be (*a*) beheaded, (*b*) enslaved, (*c*) released on paying ransom, (*d*) exchanged with Muslim prisoners, or (*e*) released gratis.

The second part of the question deals with slavery. With regard to it, there is no direct verse of

47. Ibn al-Athir, op. cit., II, 99.
48. Sarakhsiy, op. cit., IV, 229.
49. Ibid., IV, 241-43.
50. Jahiz, "البیان و التبیین," I, 22.
51. Ibn 'Asakir.

the Qur'an permitting it. The indirect hint is found in the following :

يا ايها النبى انا احللنالک ازواجک التى آتيت اجورهن و ما ملكت يمينک مما افآء الله عليک (33 : 50) -

[O Prophet ! lo ! We have made lawful unto thee thy wives unto whom thou hast paid their dowries, and those whom thy right hand possesseth of those whom Allah hath given thee as spoils of war.]

There are a few instances of it in the Islamic history.

(1) According to the decisions of arbitrators, women and children of the Banu Quraizah were enslaved and distributed as a booty.[52]

(2) The prisoners of the Hawazin were distributed among the soldiers. When the Hawazinites embraced Islam, the troops set them free.[53]

(3) Banu al-Mustaliq's women and children were captured by the Muslims. The Prophet married a daughter of the chief of the tribe. Due to this sacred relationship, the Muslim soldiers set them free.[54]

(4) The prisoners of Banu al-Anbar were also set free.[55] The Holy Prophet believed that : لارق على عربى[56] [Arabs could not be enslaved]. Under the orders of the Caliph 'Umar, the peasants, artisans and professional of the belligerent State should not be enslaved.[57] Above all the Qur'an stressed the liberation of slaves : فک رقبة[58] [It is to free a slave].

52. Ibn Hisham, p. 689.
53. Ibid., pp. 877-78.
54. Ibid., p. 729.
55. Ibid., p. 983.
56. Sarakhsiy, *Mabsut*, X, 40.
57. *Kanz al-'Ummal*, II, 314.
58. 90 : 13.

The freeing of slaves is an atonement of many an offence, The Qur'an says :

و من قتل مومنا خطا فتحرير رقبة مومنة و دية مسلمة الى اهله - (4 : 92)

[He who hath killed a believer by mistake must set free a believing slave and pay blood-money to the family of the slain.]

In case of backing out of the oaths sworn in earnest the freeing of slave is one of the prescribed expiations, or the liberation of a slave (اوتحرير رقبة [5 : 89]).

Similarly, in *zihar* the atonement is also the freeing of a slave :

والذين يظاهرون من نسائهم ثم يعودون لما قالوا فتحرير رقبة من قبل ان يتماسا (58 : 3) -

[Those who put away their wives (by saying they are as their mothers) and afterwards would go back on that which they have said, (the penalty) in that case (is) the freeing of the slave before they touch one another.]

Even the Orientalists appreciate the efforts of the Holy Prophet in the emancipation of the prisoners of war. Mr Godfrey Higgins says :

"Mohammad found slavery as existing institution, and took various measures to put a stop to it. He struck the hammer deep down to root when he shut the only way by which God's free men were turned into man's captives, namely, by a positive enactment that henceforth no war prisoners should be reduced to slavery ; they must be granted liberty, either freely or for ransom . . . who will yet say Mohammad did nothing to abolish slavery ?"[59]

59. *Apology for Muhammad*, pp. 115-16.

The Comparison of Islamic and Roman Slavery

"Slavery means a state of bondage, the ownership of mankind as a chattel or at least the control of the labour and services of one man for the benefit of another and the absence of legal right to the disposal of his own person, property and service."[60]

In the Roman law, slavery had its origin in the following three modes: (1) by birth, (2) by international law and (3) by reduction to slavery.

The legal position of a slave in the Roman law was that of a thing and not that of a person. He had no legal rights. If wronged, the wrongdoer was liable, not to the slave, but to his master. On the other hand, for the wrongs of a slave, his master was liable. He had several disabilities, such as he could not be a witness in a court of law, and had no right of succession to anybody's property, etc. The power of the master over the slave was of life and death.

Under the Empire, however, the position of the slave was improved by legislation, e.g. freedom was conferred on those infirm and sick slaves who were turned out by their masters, fight between wild beasts and slaves was forbidden and killing of another man's slave was a crime, etc.

The practice of manumission was also prevalent among the Romans. Justinian, however, enacted that a manumitted slave should receive the caput of citizenship.

60. Syed Sharifuddin Pirzada, op. cit., p. 209.

"Islam has done much to minimise slavery; it has not abolished it altogether. Certainly it is not obligatory always to enslave prisoners of war, yet it cannot be denied that the supreme commander of an army has the choice to accord the prisoners either enslavement or any other treatment."[61] The conception of slavery in Islam is different to the Romans'. Slave in Islam does not convey the same idea as in other civilisations. Both master and slave are on equal footing with respect to food, clothing and shelter. The Prophet said: "And as to your slaves, see that ye feed them as ye feed yourselves and clothe them as ye clothe yourselves."

"Islam recognises no distinction of race or colour, black or white, citizens or soldiers, ruler or subjects, they are perfectly equal, not in theory only, but in practice. In the field or in the guest chamber, in the tent or in the palace, in the mosque or in the market, they mix without reserve and without contempt. The first Muezzin of Islam, a devoted adherent and an esteemed disciple, was a negro slave."[62] In devotional matter they are at a par. 'Allamah Iqbal says:

ایک ہی صف میں کھڑے ہوگئے محمود و ایاز
نہ کوئی بندہ رہا اور نہ کوئی بندہ نواز
بندہ و صاحب و محتاج و غنی ایک ہوئے
تیری سرکار میں پہنچے تو سبھی ایک ہوئے

In the Roman law, according to N.H. Jhabvala,

61. Dr M. Hamidullah, op. cit., p. 218.
62. S. Ameer Ali, *The Spirit of Islam*. p. 262.

"with the advance of time, towards the close of the Republic, the number of manumitted slaves increased immensely. Need was, therefore, felt for enacting laws which tended to restrict manumission as far as possible."[63] On the other hand, in Islam to enslave a person is not at all obligatory. He may be manumitted gratuitously or on ransom. The Holy Qur'an says :

فاذا لقيتم الذين كفروا فضرب الرقاب حتى اذا اثخنتموهم فشدوا الوثاق فاما منا بعد و اما فداء حتى تضع الحرب او زارها (47 : 4) -

[Now when ye meet in battle those who disbelieve, then it is smiting of the necks until, when ye have routed them, then making fast of bonds ; and afterwards either grace or ransom till the war lay down its burdens.]

انما الصدقت للفقراء و المسكين و العملين عليها و المولفة قلوبهم و فى الرقاب و الغارمين و فى سبيل الله و ابن السبيل فريضة من الله (60 : 9) -

[The alms are only for the poor and the needy, and those who collect them, and those whose hearts are to be reconciled, and to free the captives and the debtor and for the cause of Allah, and (for) the wayfarer : a duty imposed by Allah.]

والذين يبتغون الكتب مما ملكت ايمانكم فكاتبوهم ان علمتم فيهم خيرا (24 : 33) -

[And such of your slaves as seek a writing (of emancipation), write it for them if ye are aware of aught of good in them.]

The above verse was interpreted by the Caliph 'Umar to mean that if a Muslim slave wanted to work and

63. *Principles of Roman Law*, p. 30.

thus pay off his value to his master, the master was not in a position to refuse the offer.[64]

Another marked difference between the two systems is that in Roman law after manumission the patron's right over a manumitted slave remained intact. After manumission the relation between the slave and his master became that of freedman and patron. A freedman's private rights were similar to those of a citizen but certain rights were denied to him in matters of State. Thus a freedman, though free, could not hold any office in the State. The bond, between him and his patron, was not altogether dissolved.[65] In Islam, on the other hand, such restrictions are not attached to the freedman. When freed, he is at a par with other Muslims. Islam does not compel any slave to embrace Islam. Dr Muhammad Hamidullah says :

"Islam has done much to improve international treatment of slaves, and Hobhouse (*Morals in Evolution*) has no hesitation in admitting that the betterment of the treatment meted out to slaves in non-Muslim countries, Christians not excluded, is traceable mostly to Islamic influence."[66]

So far as complete annihilation of slavery in Islam is concerned, it depends upon the attitude of the other nations also. Islam has rendered a yeoman's services to ameliorate the sufferings of the slaves. In fact, there are circumstances in which it may be in the interest of humanity to have recourse

64. Shibli, *al-Faruq*, citing Bukhari.
65. Jhabvala, op. cit., p. 33.
66. Op. cit., p. 219.

to enslavement. If, for instance, a people religiously believe that all aliens are untouchable, and treat human beings worse than animals, and at the same time refuse to listen to the counsel of humanitarianism ; or if a people of one complexion have an exaggerated prejudice against those created by God with a skin of another colour, and treat them in a disgusting manner, it is in the interest of humanity to proceed internationally against such unhuman people, to enslave them and to put them under the mandate of a people who have no prejudice of colour or race or tongue."[67]

Summing up, we can say that "one must distinguish between an obligatory rule and an optional rule. Slavery is optional, and if Muslims give up that practice, they commit no violation of their religious commands."[68]

Islam and the Geneva Conventions

It is an admitted fact that Islam has done much service to minimise the sufferings of the prisoners of war and wounded persons. Successful efforts have been made to ease and ameliorate their hardships under Qur'anic injunctions and practice of the Holy Prophet. The Qur'an says :

ما كان لنبى ان يكون له اسرىٰ حتى يثخن فى الارض (8 : 67) -

[It is not for any Prophet to have captives until he hath made slaughter in the land.]

67. Ibid., p. 219.

68. Ibid., p. viii.

The Holy Prophet says : فكوا العانى[69] [Manage the release of the prisoner]. In Islam the prisoners were not compelled to undergo hard labour.

In the primitive period, when the battle ended, the prisoners had to face inhuman treatment at the hands of the victors. Mian Ghulam Sarwar says :

"Wars have been fought between tribes, nations and countries, since times immemorial and the victors or dominating powers had been taking the warriors of the enemy camps as part of spoil. The ancient history records that the prisoners had been subject to relentless cruelty and endless slavery in various countries and kingdoms. As no moral code for treatment of captives existed, barbarian practices remained in vogue in the middle ages and continued till the eighteenth century. Islam made the provision that a prisoner of war may be released on payment of ransom (*Fidya*) as early as seventh century."[70]

A brief history of the Geneva Conventions is given for understanding the full significance of the subject in hand. In the eighteenth century the Western world paid heed to this grave problem. After the Napoleonic war, the humanitarian aspect of this problem was considered. The first important step towards the laws of war was taken in the declaration of Paris on 16 April 1856. This treaty was signed by a number of States. It concerned with the warfare on sea. This followed the First Geneva Convention, 1854, for the amelioration of the conditions of the wounded in battlefields. Later on, this was revised

69. Bukhari, 56 : 171.

70. *The Geneva Conventions and Pakistani Prisoners of War*, p. 6.

on 6 July 1906 and was termed as the Second Geneva Convention. "It extended the principles laid down in the previous convention for care and protection of sick and wounded combatants, to naval warfare and included shipwreck persons among those to be protected. It was signed by thirty-five States, and several other acceded to it, subsequently.[71]

After the First World War the Convention of 1906 was amended and in 1929 a "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field" was formulated by forty-seven States. "This Convention provided for an Information Bureau in the belligerent countries to exchange information in respect of the prisoners of war, and to safeguard their interests through a Neutral Power."[72] This convention had not yet been signed by a number of States when World War II broke out. New problems cropped up with this war. Consequently, "Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949" came into being. This fourth Convention was signed by sixty-three States.

From the above history, it becomes obvious that it was an evolutionary process of human thinking, with a very noble and humanitarian aim, to be made to prevail a sense of relief and protection for prisoners in the dreadful business of war that gave birth to it.[73] It is, no doubt, a great service in

71. Ibid., p. 8. 72. Ibid.
73. Ibid., p. 9.

alleviating the toils and sufferings of the prisoners of war. The majority of the States abide by the rules of this Convention. But, in spite of the fact that it is a sacred document, there are yet some nations of the world that flout its sanctity. Such nations are spiritually bankrupt and morally nowhere.

Islamic Notion of Conflict of Laws

Under the topic we shall discuss the following questions :

(1) Nationality.
(2) Status of Resident Aliens.
(3) The Conflict of Laws :
  (*a*) between Muslim and non-Muslim law.
  (*b*) between various non-Muslim laws.
  (*c*) between various Muslim laws.
  (*d*) on account of change of religion.
(4) The Status of Citizens of the Muslim State in :
  (*a*) another Muslim State,
  (*b*) a non-Muslim State.

(1) *Nationality*. The Qur'an lays down :

يا ايها الناس انا خلقناكم من ذكر و انثى و جعلنكم شعوبا و قبائل لتعارفوا ا ان كرمكم عندالله اتقكم ان الله عليم خبير (49 : 13) -

This is in fact a charter of Muslim nationality. It was acted upon in the time of the Prophet and is also prevalent nowadays. It presupposes the equality of man and priority of the pious:

و من آیته خلق السموات و الارض و اختلاف السنتکم و الوانکم ان فی ذلک لآیت للعالمین (30 : 32) -

The impact of modern civilisation on Islamic population has had considerable influence regarding nationality based on birth and domicile. But, according to Islamic principle, nationality means common belief, not common birth or colour or language or country. Dr Muhammad Hamidullah says :

"There is some difficulty in deciding 'Ummat' or nationality of a foundling and of a baby born of Muslim father and non-Muslim mother or of protected non-Muslim father and alien mother. In this connection Muslim law lays down a general rule that the baby will follow that *Ummat* which is better in his interest. So the foundling discovered in the Islamic territory and baby born of Muslim father will be considered Muslim, and the baby born of parents one of whom is non-Muslim citizen and the other an alien will become a non-Muslim citizen of the Islamic State. This will, however, be a *prima facie* presumption which might be rebutted on production of evidence."[74]

(2) *Status of Non-Muslims, Subjects and Aliens.* Non-Muslim subjects of the Islamic State are called *dhimmis*. If a *dhimmi* is loyal and pays *jizyah*, he gets the freedom of residence, freedom of conscience, and protection of life, property and honour. This contract of dhimmification ceases on disloyal acts, etc.

According to the Qur'an and *Hadith*, non-Muslim residents of the Islamic territory enjoy judicial autonomy, e.g. Christians and Jewish courts are estab-

74. Op. cit., p. 323.

lished with their own laws and with their own judges. The non-Muslims are, however, allowed to seek justice from the Muslim court.

Muslim jurists hold that the difference of religion as well as the difference of territory is a bar to inheritance. Thus a Muslim may lawfully marry a Jewess or a Christian girl, yet such husband and wife cannot inherit each other. Testamentary bequests can lawfully be effected in favour of persons of other religion or other territory.

Zakat is levied solely on the Muslims, yet the non-Muslims may be benefited by it. The Hanafi school maintains that a Muslim must be given death sentence for killing even a non-Muslim. Moreover, Islam does not compel anybody to believe in any particular religion. The Qur'an says : لا اکراہ فی الدین [2 : 256].

(3) *Conflict between Law : (a) between Muslim and Non-Muslim Laws.* If one of the parties to a case is a non-Muslim and the other a Muslim, and the cause of action has arisen in the Islamic territory, the case comes before the *qadi*. There is not much difficulty in civil law. In penal cases, however, there are some exemptions in favour of non-Muslims. Firstly, certain acts, such as intoxication, marriage within prohibited degrees, etc., are not considered crime if committed by non-Muslims. Secondly, regarding homicide certain jurists hold that death sentence cannot be inflicted upon a Muslim accused of murdering a non-Muslim. He will have to pay only blood-money. Yet

the Hanafis hold that no distinction can be made between a Muslim and a non-Muslim citizen.[75] They are supported by a saying of the Prophet. The Hanafis are reluctant to take the life of a Muslim who has committed homicide against a non-Muslim of a foreign country. Only Shaibani holds the opposite view.

If a Muslim citizen is murdered in a non-Muslim territory where he had gone with the permission of the foreign government and later the culprit comes to the Islamic territory no suit can be filed against him in the court of the Islamic territory because the cause of action arose in a foreign territory.[76]

(*b*) *Between Two Non-Muslim Laws*. If the parties to a case belong to different countries such as Jew versus Christian, the Muslim court does not take cognizance in the initial stage because all non-Muslim religions are a single community against Islam.

الذين يتخذون الكافرين اولياً من دون المومنين ايبتغون عند هم العزة فان العزة لله جميعا (4 : 139) -

But if the parties cannot agree with respect to the choice of the tribunal and its law, Muslim law shall be applied. There is no difference between civil and criminal cases in this respect.

(*c*) *Between Two Muslim Laws*. The difference between various schools of law are products of later times. In the time of the Prophet and Early Caliphs

75. Sarakhsi, *Sharh as-Siyar al-Kabir*, IV, 25.
76. *Idem*, *Mabsut*, X, 95-97.

there was no such difference. After the death of the Prophet there were differences of opinion between various jurists, yet the *qadis* were not bound to follow any jurist. They could decide according to their own personal view.

If the *qadis* are obliged to decide the cases according to the State school, there will be no difficulty. If the State is more tolerant and every citizen has the right to be administered according to his own school, the conflict of law arises. The problem becomes more complicated if the parties belonged to different schools. In later times the law of the defendant or the deceased was decided to prevail. The same has been the rule in Hanafi, Shafi'i and Maliki States and British India.

(*d*) *Change of Religion*. If both the spouses embrace Islam, their pre-Islamic contract of marriage remains valid in so far it is compatible with Islamic law. The rest will be annulled. For example, marrying more than four wives will not be sanctioned by the Muslim law.

If the husband embraces Islam, the marriage will remain intact only if the wife is a scripturary (كتابيه). If the wife is not a scripturary, she will be asked to change her religion. On her refusal, the husband will separate her. If the husband is a non-Muslim, he should embrace Islam within three months. During this period he cannot continue conjugal relations. If he refuses to convert, separation follows. In case the Jewish wife of a Muslim becomes Christian, the

marriage will not be affected.

(4) *Muslim Citizens in Foreign Lands:* (*a*) *In Another Muslim State.* In the primitive times not much importance was attached to the origin of a Muslim. But in the modern period due to political nationality, even the Muslim States have passed laws of nationality which are applicable to Muslim pilgrims and immigrants wishing domicile and naturalisation.

(*b*) *Muslim in Non-Muslim Lands.* In the old times, Muslims used to enjoy extra-territorial privileges in many lands, e.g. Muslim refugees in Abyssinia, China, Turkistan, Malabar (India) and in many other countries. But with the passage of time this concession has come to an end.

Islam and the Modern Community of Nations

With the outbreak of the Second World War, the League of Nations failed totally in maintaining peace in the world. It also miserably failed to control the territorial ambition of nations, race for armaments and secret treaties.

The United Nations Conference met at San Francisco in April 1945 and prepared the charter of an organisation. The Charter of the United Nations sets forth the purposes of the United Nations as follows :

(1) To maintain international peace and security and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment and settlement of international disputes ;

(2) to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples ;

(3) to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights, and for fundamental freedoms for all without distinction as to race, sex, language, or religion ;

(4) to be a centre for humanising the actions of the nations in the attainment of these common ends.

Keeping in view the above purposes of the Charter of the United Nations, we can visualise that the charter of this body is influenced by Islam. The Holy Prophet says :

"You must help your brother whether he is the oppressor or the oppressed—the oppressor, by preventing him committing acts of aggression, and the oppressed, by rescuing him from oppression."

Moreover, he was actuated by the love of humanity and firmly believed in the principle of "Live and let live". The motto of Islam is to repel aggression, and to bring about peace and tranquillity. For peaceful settlement of international disputes, the Qur'an provides rules which contemplate a body like the United Nations. The Qur'an says :

و ان طائفتان من المومنين اقتتلوا فاصلحوا بينهما فان بغت احدهما على الاخرى فقاتلوا التى تبغى حتى تفئى الى امر الله فان فاءت فاصلحوا بينهما بالعدل و اقسطوا ان الله يحب المقسطين (49 : 9) -

[And if two parties of believers fall to fighting, then make peace between them. And if one party of them doeth wrong to

the other, fight ye that which doeth wrong till it return unto the ordinance of Allah ; if it return, make peace between them justly, and act equitably. Lo ! Allah loveth the equitable.]

The United Nations Organisation seems more efficient in preventing war than the League of Nations. But the actual position is that it has also failed to prevent war due to two reasons :

(1) Voting procedure in the Security Council.

(2) So far no progress has been made by the Military Staff Committee of the Council in establishing a force capable of dealing with aggression. Moreover, the U.S.S.R. has exercised the veto power so frequently that it has become impossible for the Security Council to take any effective steps.

If the United Nations Organisation had acted on the lines as explained in the above-mentioned verse of the Holy Qur'an, international peace would have been secured without any hesitation. In order to have the smooth functioning of the U.N.O. it should not support the Big Powers and oppress the weak. Islam guides the Muslims to promote the well-being of the entire humanity. The co-operation with the non-Muslims is also the duty of the Muslims. The Qur'an lays down :

ولا يجرمنكم شنئان قوم ان صدوكم عن المسجد الحرام ان تعتدوا وتعاونوا على البر و التقوىٰ ولا تعاونو على الا ثم والعدوان واتقو الله ان الله شديد العقاب (5 : 2) ـ

[And let not your hatred of a folk who (once stopped your

going to the inviolable place of worship [the Ka'bah]) seduce you to transgress ; but help ye one another unto righteousness and piety. Help not one another unto sin and transgression, and fear Allah, Lo ! Allah is severe in punishment.]

Dr Muhammad Hamidullah says :

"It goes without saying that the whole fabric of Muslim Law was constructed for guiding the Faithful in regulating their life in this world. Whatever its ultimate object, its temporal and mundane aim is the ability to lead one's life in the fairest possible way. *Mutatis mutandis*, Muslim International Law would aim at the justest possible conduct of the Muslim ruler in his international intercourse."[77]

From the very outset Islam discourages the differences of race, colour, language and country in favour of the universal brotherhood of the Muslims. "Islam is a religion of unity and action which safeguards individual rights and liberties and provides at the same time for collective welfare.[78] Like the Charter of U.N.O. the main purpose of Islam is to secure peace. Moreover, it believes in toleration. The Qur'an says :

ان الذين آمنوا والذين هادوا والنصارىٰ و الصا بئين من امن بالله واليوم الآخر و عمل صالحا فلهم اجرهم عند ربهم ولا خوف عليهم ولا هم يحزنون (2 : 62) ـ

[Lo ! those who believe in that which is revealed unto thee, Muhammad, and those who are Jews, and Christians, and Sabaeans—whoever believeth in Allah and the Last Day and doeth right surely, their reward is with their Lord, and there shall no fear come upon them, neither shall they grieve.]

77. Op. cit., p. 17. 78. Ibid., 43.

Islam advocates that mankind is one community. The Qur'an says :

كان الناس أمة واحدة (2 : 213) -

[Mankind were one community.]

The brotherhood of man is also respected by Islam. The Qur'an lays down :

يا ايها الناس اتقوا ربكم الذى خلقكم من نفس واحده و خلق منها زوجها و بث منها رجالاً كثيرا و نساء (4 : 1) -

[O mankind ! be careful of your duty to your Lord Who created you from a single soul and from it created its mate and from them twain hath spread abroad a multitude of men and women.]

The philosophy of difference of colour and language is also explained by the Qur'an in the following verse :

و من آياته خلق السماوات و الارض واختلاف السنتكم و الوانكم ان فى ذلك لآيت للعلمين (30 : 22) -

[And of His Signs is the creation of the heavens and the earth, and the difference of your language and colour ! Lo ! herein indeed are portents for men of knowledge.]

و جعلنا كم شعوبا و قبائل لتعارفوا (49 : 13) -

[And We have made you nations and tribes that ye may know one another.]

Islam has also recognised that all States, irrespective of religion or race, have similar rights and obligations.

If we carefully examine the Charter of the United Nations Organisation, it becomes obvious that it has the impact of Islam. Most of the purposes and principles to be followed by the members of the Organisation are identical in many respects with Islamic teachings. "Islam from its very birth had no insular existence. It never believed in isolation. Its early conquests, political and religious, naturally extended its influence from the Atlantic to the Pacific. It did not give any Atlantic Charter. It did not proclaim any four freedoms. On the other hand it gave universal charter for every freedom and for every race. 'Unlike any other nation of antiquity, the public law of nations evolved by Muslims was not meant to regulate the conduct of a Muslim State with regard to Muslim States alone, excluding all the non-Muslim world.' "[79]

Penal Law

Crime, Sin and Morality

Crime. In Arabic, it is termed as جريمة ، معصية. Crime may be defined as an infringement of public right. This is a right whose infringement leaves wider repercussion on the people. According to the Islamic viewpoint, when certain primary public rights are infringed or violated, they are the wrongs of criminal nature.

Rev. F.A. Klein says :

"These designate in law certain acts committed to the detriment of either property or life or members of the body."[80]

In other words, criminal offences relate mostly to

79. Ibid., p. x.

80. *The Religion oJ Islam*. p, 224.

human body, property, reputation, religion, State, public peace, morals or decency. Shah Wali Ullah says :

"جاننا چاہیے کہ بعض معاصی میں خدا تعالیٰ نے حد مقرر فرمائی ہے اور وہ ایسے معاصی ہیں جن میں فساد کی کئی صورتیں پائی جاتی ہیں - ایک تو ان میں ملک کا فساد اور لوگوں کی آسائش کا قطع کرنا ہوتا ہے -"[81]

Criminal acts are offences which are punishable. The object of criminal proceedings is to punish wrongs. For instance, a thief is prosecuted by a State. In Islamic law, every person, irrespective of any distinction of nation, rank, caste or creed, is liable to punishment provided an offence is proved against him. The legal result of an act and of an "omission" is the same. The legal consequences of criminal proceedings, if successful, are a number of punishments, provided in the form of *hadd* and *ta'zir*.

Sin (ذنب ، خطئه ، اثم). The literal meaning of the term "sin" is transgression against Divine law or morality. The Muslim jurists classify sin into: *kabirah* (great) and *saghirah* (little). If a Muslim commits the former, and does not repent, he will be sent to the purgatoral Hell reserved for sinners, while the latter are those venial sins which are inherent in our nature. The following are some of the *kabirah* sins: (1) infidelity; (2) false witness; (3) accusation (قذف); (4) taking a false oath; (5) magic, (6) drinking wine; (7) usury; (8) adultery; (9) murder, etc.

81. Op. cit., p. 616.

Regarding sins, the Prophet says :

لا يزنى الزانى حين يزنى و هو مومن ولا يسرق السارق حين يسرق و هو مومن ولا يشرب الخمر حين يشربها وهو مومن ولا ينتهب نهبة يرفع الناس اليه فيها ابصارهم حين ينتهبها و هو مومن ولا يغل احدكم حين يغل و هو مومن فايا كم ايا كم (متفق عليه) -[82]

[He is not a believer who commits adultery or steals, or drinks liquor, or plunders, or embezzles, when entrusted with the plunder of the infidel. Beware ! beware !]

الكبائر الاشراک بالله و عقوق الوالدين و قتل النفس واليمين الغموس رواه البخارى و فى رواية انس و شهادة الزور بدل اليمين الغموس (متفق عليه) -[83]

[The greatest sin is to associate another with God, or to vex your father and mother, or to murder your own species, or to commit suicide, or to swear to lie.]

ان تدعوالله ندا و هو خلقک ، ان تقتل ولدک خشية ان يطعم معک ان تزنى حليلة جارک فانزل الله تصد يقها والذين لا يدعون مع الله الها آخر ولا يقتلون النفس التى حرم الله الا بالحق ولا يزتون الاية -[84]

[(The greatest of sins before God is) that you call any other like unto God Who created you, or that you murder your child from an idea that it will eat your victuals, or that you commit adultery with your neighbour's wife.]

اجتنبوا السبع الموبقات قالوا يا رسول الله وما هن قال الشرک بالله و السحر و قتل النفس التى حرم الله الا بالحق و اكل الربوا و اكل المال اليتيم و التولى يوم الزحف و قذف المحضات المومنات الغافلات (متفق عليه) -[85]

[Abstain ye from seven ruinous destructive things, namely, associating anything with God ; magic ; killing anyone without reason ; taking interest on money ; taking the property of the

82. "مشكوة المصابيح," p. 17.
83. Ibid.
84. Ibid.
85. Ibid.

orphan ; running away on the day of battle ; and taxing an innocent woman with adultery.]

God pardons the sins. The equivalent of pardon in Arabic is '*afw* (عفو) or *maghfirah* (مغفرة) and *ghufran* (غفران). The act of seeking pardon is *Istighfar* (استغفار).

The Holy Qur'an says :

ولله مافى السماوات و ما فى الارض ليجزى الذين اساءو بما عملوا و يجزى الذين احسنوا بالحسنى - الذين يجتنبون كبائر الا ثم والفواحش الا اللمم ان ربک واسع المغفرة (53 : 31-32) -

[And unto Allah belongeth whatsoever is the heavens and whatsoever is in the earth, that He may reward those who do evil with that which they have done, and reward those who do good with goodness. Those who avoid enormities of sin and abominations save the unwilled offences: (for them) lo! thy Lord is of vast mercy.]

ان الذين يخشون ربهم بالغيب لهم مغفرة و اجر كبير (62 : 12) -

[Lo! those who fear their Lord in secret, their will be forgiveness and a great reward.]

يصلح لكم اعمالكم و يغفرلكم ذنوبكم و من يطع الله و رسوله فقد فاز فوزا عظيما (33 : 71) -

[He will adjust your works for you and will forgive you your sins. Whosoever obeyeth Allah and His messenger, he verily hath gained a signal victory.]

والذين آمنوا و عملوا الصالحات لهم مغفرة و اجر كبير (35 : 7) -

[And those who believe and do good works, theirs will be forgiveness and great reward.]

According to Imam Nawawi (امام نووی), repentance (توبہ) means turning the heart from sin.[82] The word *taubah* occurs in the Qur'an, for example :

فان تابا و اصلحا فاعرضوا عنهما ان الله كان توابا رحيما (4 : 16) -

[And if they repent and improve, then let them be. Lo! Allah is Ever Relenting, Merciful.]

و من تاب و عمل صالحا فانه يتوب الى الله متابا (25 : 71) -

[And whosoever repenteth and doeth good, he verily repenteth toward Allah with true repentance.]

Some of the Traditions on the subject are as follows :

(1) عن الاغر المزنى قال قال رسول الله صلى الله عليه وسلم انه ليغان على قلبى و انى لا ستغفر الله فى اليوم مائة مرة (رواه مسلم) -[86]

[اغر مزنی رضی الله عنه کہتے ہیں : فرمایا رسول الله صلی الله علیه وسلم نے : لوگو ! توبہ کرو خدا سے - میں توبہ کرتا ہوں خدا کی طرف دن میں سو مرتبہ -]

(2) عن عائشة قالت قال رسول الله صلى الله عليه وسلم ان العبد اذا اعترف ثم تاب تاب الله عليه (متفق عليه) -[87]

[عائشہ رضی الله عنہا کہتی ہیں : فرمایا رسول الله صلی الله علیه وسلم نے کہ بندہ جب اقرار کرتا ہے اپنے گناہ کا اور پھر توبہ کرتا ہے تو الله اس کی توبہ قبول کرتا ہے -]

Morality. "By natural or moral law is meant the principles of natural right and wrong—the principles of natural justice, if we use the term justice in its widest sense to include all forms of rightful action."[88] Islam attaches great importance to moral values. The Qur'an abounds in morality. The ethical code of Islam is mostly given in Surah Nisa. Some of the principles of morality as enunciated by the Qur'an

86. Ibid,. p. 303. 87. *Sahih Muslim*, II, 354.
88. Salmond, Op. cit., p. 26.

are thus :

(1) لا تلبسوا الحق بالباطل و تکتموا الحق و انتم تعلمون (2 : 42) ۔
[سچائی کو جھوٹ کا لباس نہ پہناؤ اور حقیقت کو نہ چھپاؤ ، ایسی حالت میں جب کہ تم کو علم ہو ۔]

(2) لا تکتموا الشهادة و من یکتمها فانه اثم قلبه (2 : 39) ۔
[گواہی کو نہ چھپاؤ ۔ جو اس کو چھپائے بے شک اس کا دل مجرم ہے ۔]

(3) کونوا مع الصادقین (9 : 14) ۔
[سچے لوگوں کے ساتھ رہو ۔]

(4) قولوا قولا سدیدا (33 : 9) ۔
[بات پکی ، سیدھی اور صحیح کہو ۔]

(5) کونوا قوامین بالقسط (4 : 20) ۔
[انصاف پر پوری مضبوطی سے قائم رہو ۔]

(6) اعدلوا هو اقرب اللتقوی (5 : 2) ۔
[انصاف کرو اس کو تقوی سے بڑا قریبی تعلق ہے ۔]

(7) اوفوا بالعقود (5 : 2) ۔
[اقرار اور وعدے پورے کرو ۔]

(8) یا ایها الذین آمنوا لم تقولون مالا تفعلون (61 : 1) ۔
[اے ایمان والو ! تم وہ بات کیوں کہتے ہو جس کو نہیں کرتے ؟]

(9) خذ العفو (7 : 22) ۔
[در گزر کی عادت اختیار کرو ۔]

(10) عباد الرحمن الذین یمشون علی الارض هونا (22 : 4) ۔
[اللہ کے خاص بندے وہ لوگ ہیں جو زمین پر دبے پاؤں (تواضع سے) چلتے ہیں ۔]

(11) قولوا للناس حسنا (2 : 8) ۔
[لوگوں سے بات چیت اچھے طریقے سے کرو ۔]

(12) واقصد فی مشیک (31 : 2) ۔
[اپنی رفتار میں میانہ روی اختیار کرو ۔]

(13) صابروا و رابطوا (3 : 20) ۔
[معاملات میں ثابت قدم رہو اور مستعد رہو ۔]

(14) اجتنبوا قول الزور (22 : 5) ۔
[جھوٹ بات سے بچو ۔]

(15) لا تلمزوا انفسکم (49 : 2) ۔
[ایک دوسرے کو عیب نہ لگاؤ ۔]

(16) لا تجسسوا (49 : 2) ۔
[کسی کے عیب کی تلاش میں نہ رہو ۔]

(17) اجتنبوا کثیرا من الظن ان بعض الظن اثم (49 : 2) ۔
[گمان سے اکثر بچا کرو کیونکہ بعض گمان گناہ ہوتے ہیں ۔]

(18) ان الله لا یحب المعتدین (2 : 24)
[اللہ حد سے بڑھ جانے والوں کو پسند نہیں کرتا ۔]

(19) لا تنازعوا فتفشلوا و تذهب ریحکم (8 : 6) ۔
[آپس میں نہ جھگڑو کہ اس سے ہمت ہار جاؤگے اور تمہارا وقار اور زور جاتا رہے گا ۔]

Besides the above verses, there are numerous other verses in which the principles of morality are described. Mr Ameer Ali says :

"No religion of the world prior to Islam had consecrated charity, the support of the widow, the orphans and the helpless poor, by enrolling its principles among the positive enactments

of Islam."[89]

Muslim law attaches great importance to moral laws. It is obvious from the origin, sources and object of Islamic law that it has great regard for ethical values. In the outset the Muslim jurists concentrated on the principles of religion. Later on, a number of sciences came into being, e.g. history, philology, astronomy, etc. The study of these sciences was subservient to the teachings of the Qur'an. Dr Muhammad Hamidullah says :

> "No Muslim science was originally cultivated for its own sake, independent and regardless of others, but all were made subservient to the *Shari'ah* in order to contribute to the well-being of Man in this world as well as in the Hereafter."[90]

Western Theories of Criminality

Theories of crime fall into four classes: (1) sociological, (2) physical or biological, (3) psychological and (4) psychiatric. We shall explain them one by one.

(1) *Early Sociological Approach.* In order to understand the lives of criminals, experts collected statistics regarding the study of individual criminals. Gabriel Tarde, the French sociologist, and others regarded crime as a social phenomenon. He regarded social interaction to be the process of imitation.

Mr W.A. Bonger, the Dutch criminologist, considered crime to be a by-product of capitalism because it is closely related to the economic system.

89. *The Spirit of Islam*, p. 169. 90. Op. cit., p. 71.

For instance, theft is directly related to the division of people into rich and poor.

(2) *Physical and Biological Approach.* Social theories were overshadowed by biological theories. The scientists and physicians elaborated new biological theories in connection with the explanation of social behaviour. Mr Ceasare Lambroso, the Italian physician, tried to connect criminal behaviour with biological causes. He established the Positive School of Criminology. He believed that the criminal was so low in the evolutionary scale that he retained certain animal characteristics of savagery not found in non-criminal persons.[91]

(3) *Psychological Approach.* The psychologists attempt to relate crime to feeble-mindedness. It seems that the psychologists were still trying to find one cause for all crimes. According to their point of view, the cause of criminality, whether physical or mental, is inheritable. Henry Goddard (New Jersey) regarded low-grade mentality as the greatest single cause of delinquency and crime. This low-grade mentality begets from feeble-mindedness. A feeble-minded person is almost sure to commit crime.

(4) *The Psychiatric-psychoanalytic Approach.* Dr William Healy (Chicago) opined that several factors operated to cause criminal behaviour. Sometimes criminal acts are the result of conflicts and frustration. For example, when a child steps towards adulthood, he wants self-assertion and independence from

91. Ruth Shonle Cavan, *Criminology*, p. 319.

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the restrictions of family. If these natural urges are suppressed, he feels dejected and frustrated. Consequently, he reacts desperately against such restrictions and steals a chance for the satisfaction of his urges.

The psychoanalytic approach also views crime as significant in terms of a person's inner emotional urges and as a part of the process by which he seeks inner peace and self-approval.[92]

Synthesis of Present-day Approaches. If we examine carefully we can find that both the psychiatric, psychoanalytic and the sociological approaches agree on certain points :

(1) That the development of criminal behaviour is a process that has its roots in the experience of early childhood.

(2) That no child is a born criminal but he adopts criminal behaviour as a result of experiences that begin early in life.

(3) That there is no easy way to understand crime.

(4) That there is no quick and sure cure for crime.

(5) That the process of eliminating crime or of reform of criminals is slow and uncertain.

Here the question arises as to why some people become criminals and others do not. The psychiatrist or psychoanalyst would say that those who become delinquent have emotional conflicts engendered by their early life-experiences; the psychologists would

92. Ibid., pp. 377-78.

say that the choice is in part accidental and in part determined by whether or not conventional groups have absorbed the individual and thus prevented association with delinquent groups.[93]

Islamic Theories of Criminality

The main theory of criminality in Islam is that a man himself is responsible for his actions. It is due to his heinous and evil deeds that he is criminally prosecuted. According to Islamic view, no one is born criminal. These are his own acts which make him good or bad. He is free to act. The Qur'an says :

و هديناه النجدين (90 : 10) -

[اور دکھائی ہم نے اس کو دو راہیں -]

As he was shown both the paths of good and evil, so it would be his own skill to choose the right track. The principle of personal responsibility of the offender committing the offence is clear from the Qur'anic verse which explicitly directs that :

لها ما كسبت و عليها ما اكتسبت (2 : 286) -

[For it (is only) that which it hath earned, and against it (only) that which it hath deserved.]

Whenever a person commits a criminal act, it is mostly due to his ulterior motive. He substantiates his inner self or motive in the form of crime. In fact, crimes are the product of evil designs. That is why God says :

93. Ibid., p. 346.

و لكن يواخذكم بما كسبت قلوبكم (2 : 225) -

[اور بلکہ اللہ تعالیٰ تمھیں تمھارے دل کی کمائی پر پکڑے گا -]

بلیٰ من كسبت سيئة و احاطت به خطيئته فاولئک اصحاب النار هم فيها خالدون (2 : 81) -

[ہاں جو لوگ برے کام کریں اور ان کی خطا آن کو گھیرے تو یہ لوگ جہنمی ہیں - وہ اس میں رہیں گے -]

ما اصابكم من مصيبة فبما كسبت ايديكم (42 : 30) -

[جو مصیبت تم کو پہنچتی ہے وہ تمھارے اعمال کی وجہ سے پہنچتی ہے -]

جزاءً و فاقا (78 : 26) -

[Reward proportioned (to their evil) deeds.]

انا انذرناكم عذاباً قريباً يوم ينظر المرء ما قدمت يداهُ و يقول الكافر يالیتنی كنت ترابا (78 : 40) -

[Lo ! We warn you of a doom at hand, a day whereon a man will look on that which his own hands have sent before, and the disbeliever will cry : Would that I were dust !]

ولا تكسب كل نفس الا عليها (6 : 164) -

[Each soul earneth only on its own account.]

So it is obvious from the above-mentioned verses that crimes are due to one's own volition to act in a manner that violates the commandments of Allah. In short, the cause of crime is one's own evil acts.

Another important approach to the theory of crime is that no one will be responsible for the actions of others. It is provided in the Holy Qur'an that :

ولا تذر و ازرة وزر اخرى (6 : 164) -

[Nor doth any laden bear another's (load) with the exception of collective responsibility for payment of damages resulting from a crime.]

Five Universals. According to Muslim jurists, rights may be classified into rights of God (حقوق الله) and rights of men (حقوق العباد). The former are those which involve the benefit to the community at large, while the latter are those which are not attributed to God but to a particular individual. The enforcement of the rights of God vests in the State, while the enforcement of the rights of men, to the pleasure of the individual concerned. Rights of God may be linked to public rights and rights of men to private rights. Mr Abdur Rahim says :

"If we group private rights with reference to the purpose of law, then some of them would relate to matters of primary necessity, such as the right to the protection of person and property, and the others would relate to matters of secondary necessity, such as rights arising out of contracts."[94]

Viewed with reference to their subject matter (original) private rights may be classified as :

(1) Right to the safety of person (*nafs* حفاظت نفس).
(2) Right to the safety of reputation (*hurmat* حفاظت حرمت).
(3) Rights to the safety of property (حفاظت ملک).
(4) Rights to the safety of faith (حفاظت دین).
(5) Rights to the safety of soundness of human mind (حفاظت عقل).

Structure of Crime (الاركان العامة للجريمة). The follow-

94. Op. cit., p. 206.

ing are the three elements of crime:

(1) *Legal Element* (الركن الشرعى). There must be a text to forbid and punish a crime.

(2) *Material Element* (الركن الهادى). The criminal act is either by commission or omission.

(3) *Metaphysical Element* (الركن الادبى). A criminal must be major, that is, liable for his crime.

Classification of Crime (تقسيم الجرائم)

Crime may be classified as:

First Grade. Crime affecting the public. It includes all those crimes which affect the general public. It has two kinds and each has different law.

(*a*) *First Kind.* Crimes with full punishment are seven in number: (1) *zina*', (2) slander, (3) drinking, (4) theft, (5) robbery, (6) apostasy and (7) treason.

(*b*) *Second Kind.* (1) Intentional homicide, (2) culpable homicide not amounting to murder, (3) unintentional murder, (4) intentional injury, and (5) unintentional injury.

Second Grade. This grade includes all those crimes which are not classified under the first grade. It has three kinds: (1) The crimes relating to original punishments (تعازير) are those which are neither *hudud* nor retaliation nor blood-money. (2) The crimes relating to those *hudud* whose punishment is not prescribed; either they are incomplete or their *hadd* is averted. (3) Crimes relating to retaliation or blood-money whose punishment is not prescribed, such as those crimes in which there is no retaliation

or blood-money.

Exceptions (ارتفاع المسؤلية والعقوبه). The punishment is averted by the following defective capacities:

(*i*) *Coercion* (اكراه). It is a circumstance which affects one's consent. In order that consent may be justly allowed as a title of right, it must be free.

According to Islamic law if under coercion a man's life is not in danger, he should not choose to break the law but rather put up with the consequences of conforming to it. If the coercive act is grave, all acts involuntarily done by a man do not render him liable. For instance, if a man is in a grave danger of death, he is allowed to drink liquor, but in case he is forced to kill another Muslim under duress (not mild), he is forbidden to do so.

(*ii*) *Intoxication* (سكر). So far as its effect on man's legal capacity is concerned, its cause may be taken into consideration, that is to say, how it is brought about. The legal capacity is affected if he is forced to drink intoxicating liquor; and all his disposition of property would be void in the eye of law. But he is liable, if he destroys or damages another's property.

(*iii*) *Lunacy* (جنون). The legal capacity of an insane person except as to acts done in lucid intervals is affected. Lunacy does not give a general character to commit wrongs. But a lunatic, like an infant, will not be liable for fraud or malice unless the court be of opinion that he was capable of conceiving such intention. Mr Abdur Rahim says: "If a lunatic's

parents leave him within the jurisdiction of a Muslim State, he will be treated as a Muslim."[95]

(*iv*) *Infancy or Minority* (صغر السن). "In Islamic law all acts done by a minor, if for his benefit, are upheld. He is not liable to penalties which are in the nature of private rights like retaliation, nor can he be deprived of inheritance from a person whose death he has caused. He is also exempted from all punishments which are public rights such as *hadd*." The position of a minor is exactly the same in English law.

Relationship of Culture and Crime. Islam signifies complete subservience of the will of the individual and the collective society to the command and dictates of Allah. When Allah created matter out of nothing He laid down certain rules of behaviour for his creation, e.g. laws of astronomy, physics, chemistry, botany, zoology, etc., for the well-being of man. In the field of human relations also we find that man depends upon Allah in all the walks and relations of his individual and collective life. As such he is bound to obey the laws of Allah in every sphere of life, individual, tribal and international. Human society can flourish and thrive only as long as it subjugates its will and desire to the law enunciated by Allah. These laws can be discerned only by the selected few, namely, the Prophets, and are contained in the Holy Scriptures having been made known

95. Ibid., p. 245.

to man through direct and immediate revelation. Human history is replete with examples of those who achieved the *summum bonum* of human existence by following the laws of Allah in letter and spirit. More numerous, of course, are the instances of nations that fell into the abyss of misery and squalor by disobeying the laws of Allah. Crime as such brings about the dissipation and ultimate downfall of a nation's civilisation and individuals. Punishment comes either in the form of Divine retribution (عذاب الٰہی) or mental a d physical distortio n. There are a number of examples of such retribution of God in Surah Hud. The Qur'an says :

و اخذ الذين ظلموا الصيحة فاصبحوا فى ديارهم جاثمين (11 : 67) -

[And the (awful) cry overtook those who did wrong, so that morning found them prostrate in their dwellings.]

فلما جاء امرنا جعلنا عاليها سافلها و امطرنا عليها حجارة من سجيل منضود (11 : 82) -

[So when Our Commandment came to pass We overthrew (that township) and rained upon it stones of clay, one after another.]

و كذلک اخذ ربک اذا اخذ القرىٰ و هى ظالمة ان اخذه اليم شديد (11 : 102) -

[Even thus is the grasp of thy Lord when He graspeth the townships or communities while they are doing wrong. Lo ! His grasp is painful, very strong.]

The penal law of Islam is calculated to save mankind from incurring the wrath of Allah by nipping the evil in the bud. Even a cursory study of human

history would show that nations have incurred the wrath of Allah when they were guilty of crimes against human nature. These crimes may be enumerated thus :

(*a*) Loss of faith in Allah and the Day of Judgment.

(*b*) Opposition to the Messenger of Allah.

(*c*) Offering resistance to and opposing the era of goodwill and peace ushered in by the Messengers of Allah and their followers, whether it be by destruction of human life, property or ethical values.

(*d*) Offences against the values of society envisaged by matrimonial and family life.

(*e*) Greed and avarice.

(*f*) Offences against the socio-economic values of Islam.

(*g*) Crimes leading to the breaking up of fraternal relations between man and man by slander (قطع رحمی) and backbiting, etc.

The Islamic penal law upholds, defends and consolidates the positive values of Muslim society, namely, the Five Universals. Islamic culture prescribes these limits within which society can efficiently carry out the purpose of human creation. Transgressors of these limits render themselves liable to prosecution under Islamic law.

Common Intention (اشتراک). When a criminal act is done either by one person or more than one person with a common intention, all of them are liable.

Common intention implies a pre-arranged plan. A pre-arranged plan may be made shortly or immediately before the commission of an offence. In fact, the criminal act is done by one of the accused persons in furtherance of the common intention of all.

The forms of participation and assistance are fourfold. The accused may take part in committing the material element of crime with others. He may agree with others in committing an offence either persuading the others or committing it in different means without his actual participation. All of them will be considered equal in crime either personally or physically participating in committing the material element of crime or without physical participation.

To constitute common intention it is necessary that the intention of each one of them be known to the rest of them and shared by them. For example, where a number of persons equipped with weapons attacked a man and killed him, all of them are held guilty of murder.

There are two conditions of common intention :

(*i*) That they are greater in number. If they are not greater in number, there is no criminal intention either direct or indirect.

(*ii*) That a criminal is accused of committing a forbidden act having a punishment. If the act committed is not punishable, then there is neither crime nor a common intention.

Conspiracy (المباشره). Conspiracy begets crime directly without any aid and it is the cause of a crime. For

instance, a man is slaughtered with a knife, the act of slaughtering brings about death directly. Actually it was the cause of death at that time ; strangulating causes the death of a man, at that time it was the cause of death. In stealing one's property, the act of stealing brings about or causes theft and this is the cause or '*illat* of theft. Mr Abdur Rahim says :

"Thus if injury to a man's person or property is caused directly by an act of another person without the intervention of any other extraneous cause (الاتلاف مباشره), the law holds the latter responsible whether such act was intentional or accidental."[96]

Abetment (السبب). According to Islamic law, abetment causes crime not by itself but with some aid, and this is the cause of crime. The evidence does not by itself causes death directly, but brings about death with the aid of the act of a hangman who executes the order of a judge with respect to the sentence of death. Mr Abdur Rahim says :

"But suppose the injury or loss was the combined result of two or more causes (الا تلاف تسببا), the question then arises to which of the causes will the loss be attributed in law. In this connexion one must bear in mind the different significations of the technical terms effective cause, preparatory cause and condition."[97]

Difference between Conspiracy and Abetment. Conspiracy causes crime directly, whereas abetment causes conspiracy or it is the aid (واسطه) for bringing about the conspiracy which in its turn causes crime.

96 Ibid , p. 353. 97. Ibid.

بان المباشره تولد الجريمة دون واسطة ، و ان السبب يولد المباشرة اوهو واسطة لتولد المباشرة التى تتولد عنها الجريمة ـ[98]

If a person joins another in the commission of a crime by which he is to benefit and which it would not be possible to commit but for his aid, he is guilty of the commission of the crime.[99]

Kinds of Abetment. Abetment has three kinds.

(*a*) *Natural Abetment* (سبب حسى). It causes the actual conspiracy without any doubt, such as murder and injury under duress. It begets in a person committing a duress the intention of murder and injury.

(*b*) *Juristic Abetment* (سبب شرعى). It causes a juristic conspiracy, that is, its foundation is the legal text as the false evidence, in cases of murder and theft, which causes a *qadi* to sentence a murderer to death or chopping off the hands of a thief.

(*c*) *Customary Abetment* (سبب عرف). It causes that conspiracy which is not perceptible and legal, such as keeping poisoned food before a guest.

If someone commits conspiracy and abetment, both of these offences will be ascertained from his commission of crime because they (مباشره - سبب) are the cause of an offence and the commission of offence is not possible without their presence.

Attempt (الشروع). Attempt is an intentional preparatory action which fails in object. In Islamic law the offence of attempt is not punishable like retaliation (قصاص) and *hadd*, but with *ta'zir* according to the nature of crime.

98. "التشريع الجنائى الاسلامى," p. 451. 99. AIR 1950 All 639.

No specific punishments are prescribed for the offence of attempt in the Islamic penal law under the head of *ta'zir* because the rules of *ta'zir* are sufficient for the punishment of attempt. Ordinarily, the punishment in the form of *ta'zir* is awarded in all the crimes except *hadd* and atonement (كفاره).

Example. When an adulterer enters a house of a woman he commits a crime ; sits with her in loneliness, it is also a crime ; kisses her, this too is a crime. All these criminal acts are in the nature of attempt for the crime of *zina'*, which is not still complete. This offence is punishable under *ta'zir*. When he finally commits *zina'* then punishment of *hadd* becomes obligatory and *ta'zir* is eliminated. Hence all these preliminary acts, when committed under one complete criminal act, is called the crime of *zina'*.

Punishment for Attempt. Under the Islamic law, the crimes punishable with *hadd* and retaliation are not equal if their execution is complete or incomplete in nature. This principle is based on the following Tradition of the Holy Prophet :

من بلغ حدا فى غير حد فهو من المعتدين ـ[100]

[One who approached the limit without entering it, is among the transgressors.]

Consequently, the punishment of attempt at *zina*[3] cannot be like a punishment which is prescribed for a complete *zina'* and that is the stoning (رجم). In the

100. Quoted in "التشريع الجنائى الاسلامى," p. 350.

same way, the punishment for attempt at theft is not the cutting of hands. So it is necessary that the accused should be punished according to the nature or intensity of his criminal act.

Penal Immunity. The maxim that the king can commit no wrong is absolutely alien to the Islamic concept of justice. In Islam no one is above law. In other words, all are equal before law. There is no such distinction of rich and poor in Divine law. No special privilege is enjoyed by any person or body of persons in this respect. Once the Prophet said : "Had my daughter Fatimah committed theft, I would have chopped off her hand."[101]

The head of the Islamic State and *qadi* are only the functionaries. The duty of the former is to enforce law while the latter is to give a verdict. There are numerous examples in Islamic history when Caliphs were summoned in the courts as a party to a suit. The *qadi* used to decide the case without any fear and favour. The presence of the Caliphs or other officials of the State was essential. In the light of these facts we can safely say that there is no penal immunity to any person irrespective of his rank and status in life. The rich and poor are treated alike. The *qadi* treats the highest and the lowest as equal. Caliph 'Umar once appeared before *qadi* Zaid b. Thabit and when he was requested to take a seat beside the *qadi*, he rejected it outright. Caliph 'Ali lost his armour which was recovered from a

101. "مشكوة الصابيح," 25 : 2.

man. The case was heard by *qadi* Shuraih. The Caliph stood by the side of the accused claiming no special privilege.

Retrospective Punishment (العقوبة الرجعية). When a man commits a wrong, he is punished according to the provisions of law. Normally, the punishment is not given with retrospective effect. For example, if a man commits an act today which is not a crime, and the next day a new law is promulgated and under that law the commission of his act is a crime, he will not be punished for his act. But if the new law is enforced with retrospective effect, then that man will be punished accordingly. The punishment is only with retrospective effect if provided in the law. In the Islamic law the criminals are not punished for their past offences. The Qur'an says :

ولا تنكحوا ما نكح آباؤكم من النساء الا ما قد سلف (4 : 22) -

[And marry not those women whom your fathers married, except what hath already happened (of that nature) in the past.]

ان تجمعوا بين الاختين الا ما قد سلف ان الله كان غفوراً رحيما (4 : 23)-

[(And it is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature) in the past. Lo. Allah is Ever-Forgiving, Merciful.]

In these verses الا ما قد سلف is a saving clause. Such exceptions are available in Islamic law.

Act 11 (2) of the Universal Declaration of Human Rights is as below :

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."

Pardoning Powers of the State. In man-made law the right of mercy and pardon vests in the Head of the State, but it is otherwise in the Islamic law. Only the wronged person can forgive or pardon the accused. Islam gives this right to the wronged person only. The oppressed man has the discretion to waive his right of retaliation by forgiving the accused. The Head of the State or his functionaries are not empowered to do so. The Qur'an says :

يا ايها الذين آمنوا كتب عليكم القصاص فى القتلىٰ ؕ الحر بالحر والعبد بالعبد والانثىٰ بالانثىٰ ؕ فمن عفى له من اخيه شىء فاتباع بالمعروف وادآء اليه باحسان ؕ ذلك تخفيف من ربكم و رحمة ؕ فمن اعتدىٰ بعد ذلك فله عذاب اليم o ولكم فى القصاص حيوة يأولى الالباب لعلكم تتقون o (2 : 178-179) -

[O ye who believe ! retaliation is prescribed for you in the matter of the murdered ; the free man for the free man and the slave for the slave, and the female for the female. And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord. He who transgresseth after this will have a painful doom. And there is life for you in retaliation, O men of understanding, that ye may ward off (evil).]

In the light of the above verses it is obvious that in the absence of these provisions there is a possibility of chaos and anarchy in the world and the

oppression of the weak by the powerful.

Mr Abdur Rahim says :

"Retaliation being the right of the person injured or of his heirs, they can compound with the offender for money, or, if they chose, pardon him. Whenever retaliation for murder or hurt is compounded, the money payable as consideration can be realized only from the offender himself. So also when compensation is ordered in cases where there is a doubt as to the wilful nature of the homicide. Similarly, when the hurt caused has not resulted in death, the wrongdoer alone can be called upon to pay compensation."[102]

In short, the State has no pardoning powers in the crimes of *hudud*, retaliation and blood-money. On the other hand, in cases of *ta'zir*, the State has got such powers.

Kinds of Punishment. There are two kinds of punishment : (1) *hadd* (حد) and (2) *ta'zir* (تعزير).

Hadd. The literal meaning of *hadd* is measure or limit. In legal terminology, it means that punishment the limits of which have been defined and fixed in the Qur'an and *Hadith*. It relates to those crimes in which the right accrues to God alone, without any right accruing to humanity. The following crimes belong to this class : (*a*) adultery ("مشكوة," Book X, Ch. 1), (*b*) fornication (Q. 24 : 2), (*c*) false accusation (Q : 24 : 4), (*d*) apostasy (*Mishkat*, Book 14, Ch. 5), (*e*) drinking wine (*Mishkat*, B. 15, Ch. 4), (*f*) theft (Q. 5 : 42), (*g*) highway robbery (Q. 5 : 37).

Ta'zir. The literal meaning of *ta'zir* is to punish.

102. Op. cit , p. 359.

Ta'zir, in its primitive sense, means prohibition and also instruction ; in law it signifies an infliction undetermined in its degree by the law, on account of the right either of God, or of the individual, and the occasion of it is any offence for which *hadd* has not been appointed ; whether that offence consists in word or deed.[103]

Ta'zir may be inflicted by imposition of fine, scourging, imprisonment, etc. It is the punishment which is left to the discretion of the *qadi* or judge. According to Mr Abdur Rahim, "the objects of *Ta'zir* are the correction of the offender and the prevention of the recurrence of the crime."[104] "It is inflicted in respect of those offences which are against human life and body, property, public peace and tranquillity, decency, morals, religion, perjury, forgery, gambling and contempt of court, etc. In fact, the entire Criminal Law of Muhammadans (السياسة الشرعية) as prevalent at the present day is based on the principle of *Ta'zir*."[105]

Territorial Jurisdiction. "Substantive law is concerned with the ends which the administration of justice seeks, procedural law deals with the means and instruments by which those ends are to be attained."[106] The Islamic law has its own rules regarding the procedure to be followed in respect of judicial proccedings. Mr Abdur Rahim says :

"The person who wants his claim to be heard must first of

103. *Hidayah*, p. 203.
015. Ibid.
104. Op cit., p. 363.
106. Salmond, op. cit., p. 504.

all select the proper court, that is, the one which has jurisdiction to hear the suit. Except so far as the jurisdiction of a particular *qadi* may have been limited by his order of appointment as regards the class of cases he is to try, a plaintiff is entitled to institute his action in the court within whose local jurisdiction he and his witnesses reside. And it would make no difference in this respect if the subject matter of litigation, for example, land, be situated elsewhere or the person against whom the claim is made resides within the jurisdiction of another *qadi*."[107]

In instituting the cases the competency of a forum is very essential. As the crimes are in their nature local, so the jurisdiction of criminal courts is also local. A *qadi* within whose jurisdiction the offence is committed, is a uthorised to take cognizance and to try the case. With the exception of certain matters, the procedural law and the law of evidence in Islam is similar to English law.

107. Op. cit., p. 365.

Chapter 5

CIVIL LAW

Kinds of Legal Disposition (الاقسام التصرفات الشرعيه). All voluntary acts are called تصرفات and تصرفات الشرع are acts according to the شرع or lawful acts. Again, juristic acts are divided into: (*i*) originating acts (انشاآت); (*ii*) informations (اخبارات) and (*iii*) acts of faith (اعتقادات).

Originating acts and informations are physical acts while those of faith are mental acts. The object of originating acts is the production of a legal result, e.g. sale, marriage, divorce, etc.; and the object of information is to describe an event, for example, evidence and admission, etc.

Torts (جنايات). Tort is a legal term for all prohibited acts committed either upon the person or property. It is an infringement of a private right belonging to an individual. Thus it is a kind of civil wrong. Again, a civil wrong relates to the individual's person, safety, reputation and property. Sir Abdur Rahim says:

"The line which divides the two kinds of wrongs, torts and crimes, is sometimes very narrow or as the Muhammadan jurists put it there are some matters in which the rights of the public and of individuals are combined. The test is, to whom does the law grant the remedy, the public or the individual. If to the latter, the wrong which gave rise to the remedy will be

regarded as a tort, and, if to the former, it will be called crime."[1]

In case of tort, the wrongdoer has to compensate the wronged, in crime he will be punished by the State.

Under the Islamic law there are two remedies for torts : (*i*) retaliation (قصاص) ; (*ii*) compensation (دیت).

The former is applied in case of an infringement of a man's right to the safety of person and the latter is applied in case of infringement of man's right to property. Sh. Abul Husain Ahmad says :

"جو شخص ہمیشہ کے لیے محفوظ الدم ہو اس کو عمداً مار دینے سے قصاص لازم آتا ہے - - - - ہر اس چوٹ و زخم میں جس کی مماثلت ممکن ہو قصاص واجب ہو گا" - [2]

The injured or his heirs have the right of retaliation. They can either compound with the offender for money or pardon him.

Exercise of Rights. Article 92 of Majallah *and* Damnum Sine Injuria. Article 92 of *Majallah* provides that "a person who does an act, even if he does not act intentionally, is responsible."

"مرتکب ذمہ دار ہے چاہے وہ عمداً نہ کرے" ("مجلہ") -

In this Article the liability of a wrongdoer is given. *Damnum sine injuria* is explained by Mr Salmond as :

"although all wrongs are, in fact or in legal theory, mischievous acts, the converse is not true. All damage done is not

1. *The Principles of Muhammadan Jurisprudence*, p. 351.
2. "قدوری," pp. 222-23.

wrongful. There are cases in which the law will suffer a man knowingly and wilfully to inflict harm upon another, and will not hold him accountable for it. Harm of this description—mischief that is not wrongful because it does not fulfil even the material conditions of responsibility—is called *damnum sine injuria*."[3]

This is a mischief which is not wrongful or contrary to law.

Cases of *damnum sine injuria* are of two types : (1) Those cases in which the harm done to an individual is a gain to society at large. (2) Although harm is done to the community, yet owing to its triviality or to the difficulty of proof, etc., it does not seem proper to prevent it by law. But in case of Article 92 the wrongdoer will be liable even if he acts involuntarily. In other words, any harm which is done is wrongful. For example, forgetfulness does not negative legal capacity. As it is brought about by God, so a man is not liable so far as the right of God is concerned. But it forms no excuse if the act resulted by it affects private rights. "The reason is that the inviolability of a man's rights is absolute and is not measured by the culpability of the person violating them. Therefore, if a man in a state of forgetfulness destroys or damages another's property, he will be held liable."[4] So a person causing a harm to another person will be responsible for damages. According to Muslim jurists, he is not incapacitated.

3. Op. cit., pp. 404-05.
4. Abdur Rahim, op. cit., p. 224.

Fuzuli *and* Negotiorum Gestor *Compared*. According to Section 112 of the *Majallah*, *fuzuli* is someone making a disposition of property for another without the sanction of the *Shar'* law.

"فضولی اس شخص کو کہتے ہیں جو کسی غیر کے حق میں اس کی اجازت شرعی کے بغیر تصرف کرتا ہے" (دفعہ ۱۱۲ "مجلہ") -

In other words, he is a person who makes a transfer for another without legal right.

A sale which is dependent on the right of another, such as a sale by a person who has no right on the sale of property pledged, is a completed contract, dependent on the leave of that other.

In a *bai'* (بیع) by a *fuzuli*, if the owner of the property, or his agent, or his natural guardian or his legal guardian gives permission, the *bai'* is *nafidh*. If he does not give permission, the *bai'* is annulled. But on the giving of permission, it is a condition that the seller and the buyer and the person who gives the permission and thing sold be in existence. If one of these has perished, the permission is not lawful.

Negotiorum gestor, on the other hand, is a person who spontaneously and without the knowledge or consent of the owner, intermeddles with his property, as to do work on it, or to carry it to another place, etc. In cases of such nature there can be no contract as he acts without any lawful authority. The Roman law raised a *quasi* mandate by implication for the benefit of the owner. The Common Law also followed it in the form of subsequent ratification

of the acts by the owner or by making positive presumption by law for the benefit of particular parties. For example, if someone takes benefit out of the landed property belonging to a minor, the law will force him to account to the minor for the profits as his bailiff. It will be presumed that the property is a trust in the hands of the person for the minor.[5] As the *negotiorum gestor* interferes in the properties of others without any lawful authority, so he is bound to do the undertaken work diligently according to its aim and object.

Substantially there is no difference between *fuzuli* and *negotiorum gestor*. The *fuzuli* could not alienate the property of the owner without his permission. The permission, however, could be subsequent to the transaction. The only condition precedent for such ratification is that the *fuzuli* and the owner and the corpus coupled with the buyer should exist at the time of ratification. Another feature is that the ratification could not be implied as in the Roman law. On the other hand, *negotiorum gestor* could also not sell the property of the real owner without his consent, express or implied. The consent could be subsequent to the transaction and this could be implied as well. There is no condition for the ratification being competent that *negotiorum gestor*, the owner and the buyer coupled with the corpus, be existent at the time of ratification.

Unlawful Enrichment. In Islam unlawful enrich-

5. Wall V. Stanwick. (1887) 34 Ch. D. 763.

ment is thatwhich is acquired through unlawful means. If the wealth is earned by lawful sources, it is valid. So acquiring riches by foul means is forbidden in Islam. The Qur'an says :

واعلموا انما اموالكم و اولادكم فتنة و ان الله عنده اجر عظيم (8 : 28) -

[And know that your possessions and your children are a test, and that with Allah is immense reward.]

زين للناس حب الشهوات من النسآء والبنين والقناطير المقنطرة من الذهب والفضة والخيل المسومة والانعام والحرث ؕ ذالک متاع الحيوة الدنيا ۚ والله عنده حسن المآب o قل اؤنبئكم بخير من ذلكم ؕ للذين اتقوا عند ربهم جنات تجرى من تحتها الانهار خالدين فيها وازواج مطهرة و رضوان من الله ۗ والله بصير بالعباد (3 : 14-15) -

[Beautified for mankind is love of joys (that come) from woman and offspring, and stored-up heaps of gold and silver, and horses branded (with their mark), and cattle and land. That is comfort of the life of the world. Allah ! with Him is a more excellent abode. Say : Shall I inform you of something better than that ? For those who keep from evil are gardens with their Lord, underneath which rivers flow wherein they will abide, and pure companions, and contentment from Allah. Allah is seer of His bondmen.]

المال والبنون زينة الحيوة الدنياج والباقيات الصالحات خير عند ربک ثواباً و خير املا o (18 : 46) -

[Wealth and children are an ornament of the life of the world. But the good deeds which endure are better in thy Lord's sight for reward, and better in respect of hope.]

The Holy Prophet is reported to have said :

"Whoever desires the world and its riches in a lawful manner, in order to withhold himself from begging, or to provide a livelihood for his family, or to be kind to his neighbours, will appear before God on the Last Day with his face as bright as the full moon. But whoever seeks the riches of the world for the sake of ostentations will appear before God in His anger"[6]

The wealth earned by the sweat of one's brow is lawful. The accumulation of wealth without paying *zakat* is unlawful enrichment. Its payment is obligatory on Muslims who are صاحب نصاب. It may be collected by State authorities by enforcing disciplinary measures. For instance, the first Caliph Abu Bakr did so.

Article 97 of the Majallah *and* "Quantum Meruit". *Quantum meruit* (so much as he has earned), an action on the case, express or implied, grounded on a promise to pay the plaintiff for doing a thing as much as he has earned or merited. Abolished in effect as a form of action by the rules (H.T.I. Wm. 4); but the term is in use to meet the cases where plaintiff, failing to prove a special contract to pay him a particular amount, recovers what may be considered to be the value of his work, in which case he is said to recover on *quantum meruit*.[7] *Quantum meruit* signifies the payment in accordance with the benefit received. The money paid will be equivalent to its use, whereas Article 97 *of the Majallah* says that "without legal cause it is not allowed for anyone to take the property of another" :

6. *Mishkat*, Book XXII, Ch. XXIII.
7. Wharton, *Law Lexicon*, pp. 718-19.

کسی قانونی سبب کے بغیر کسی شخص کا مال لینے کا اختیار نہیں ۔

So it is clear that no property may be acquired except in a legal form. For example, in the Islamic State, *zakat* will be collected according to the prescribed rates. The State has an authority to realise it accordingly. Taking of money in this form is legal, otherwise no one is allowed to do so. Suppose a person owes a certain amount to another person. It may be realised from him by executing a money-decree against him. Such a recovery of money has the legal basis. Ordinarily, the property of any person cannot be taken into possession without any lawful authority. Moreover, the acquiring of property must be according to the right claimed, otherwise it will be transgression. This is an admitted fact that an unauthorised dealing in the property of others is strictly prohibited in Islamic law.

Transgression of Forbidden Acts. A juristic act is legally correct if it has its essential elements, conforms strictly to the necessary conditions and possesses those extrinsic characteristics as envisaged by law, otherwise it is regarded as vitiated (فاسد) in law. If a juristic act lacks any of its essential conditions, it is called void (باطل). A void or forbidden act is bad essentially. A valid juristic act attains the desired object, while a void act fails to attain such object. For example, drinking wine, usury, and eating of pork, etc., are prohibited acts. The Shafi'is hold that juristic acts are of two kinds only, namely : (1) valid, or (2) void. They group vitiated acts under void acts.

Wrongful Appropriation or Destruction of Property

Torts regarding property may either be in the form of usurpation or appropriation (غصب) or destruction or damage (تلف ۔ نقصان). *Ghasab* literally means forcibly taking a thing from another. In legal terminology it signifies the taking of a property of another which is valuable and sacred, without the permission of the owner. This may take the form of destroying or damaging the owner's possession of it. For example, if someone forcibly takes the service of the slave of another or loads an animal belonging to another, the act of appropriation will be established. On the other hand, if someone sits upon the carpet of another, the possession of the owner is not destroyed. Sh. Abul Husain says :

"اگر کوئی کسی کی چیز چھین لے یا دبا لے اور اس کے پاس سے وہ چیز تلف ہو جائے تو اگر وہ چیز ایسی ہے کہ اس جیسی چیز مل سکتی ہے تب تو اس سے وہ چیز ہی دلائی جائے گی اور اگر وہ چیز ایسی ہے کہ اس جیسی چیز نہیں ملتی تو اس کی قیمت دلائی جائے گی ۔"[8]

A wrongful appropriation cannot be sold or transferred. If anybody intentionally usurps the property of another, he is liable to pay a compensation. If, on the other hand, he made the usurpation unintentionally, even then he will have to pay the compensation. In this case he is not an offender because his erroneous offence is cancelled.[9]

8. "قدوری," p. 159.

9. *Hidayah*, III, 522.

Article 92 of the Majallah *and Rylands vs. Fletcher.* The case of Rylands versus Fletcher lays down that where the owner of land, without wilfulness or negligence, uses his land in ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable for any mischief thereby occasioned.

The principle of Rylands versus Fletcher is :

"That the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."[10]

The principle of Rylands versus Fletcher has been called "the wild beast theory".[11] Unless there is an escape of the substance from the occupier's land, there is no liability under the rules.

Article 92 of the *Majallah* says that "a person who does an act, even if he does not act intentionally, is responsible" :

مرتکب ذمہ دار ہے چاہے وہ عمداً نہ کرے (مجلہ) -

Article 92 of the *Majallah* and the principle enunciated in Rylands vs. Fletcher are identical. In other words, the owner of a thing has only a general right of the use thereof. His right is not absolute or unlimited. He is perfectly justified in doing anything on his property so long as his act does not affect the property of another injuriously. In case he does anything, though, innocently, by which the property of another, even though that another may not be his immediate neighbour, is damaged, he is responsible for the damage so caused. Thus tort is the doctrine of strict liability which is determined irrespective of the existence or non-existence of intention or the knowledge of the person liable. Sir Frederick Pollock says :

"The law takes notice that certain things are a source of extraordinary risks, and a man who exposes his neighbour to such risk is held, although his act is not of itself wrongful, to insure his neighbour against any consequent harm not due to some cause beyond human foresight and control."[12]

Verbal Dispositions (التصرفات القولیہ). Verbal dispositions are of two types : (1) unilateral, e.g. *waqf* and bequest, etc.; (2) bilateral, e.g. contracts.

Waqf (وقف). The literal meaning of *waqf* is detention. The legal meaning of *waqf*, according to Imam Abu Hanifah, is the detention of a specific thing in the ownership of the *waqif*, and the devoting of its profits in charity to the poor or other good objects. A *waqf* extinguishes the right of the *waqif* and transfers ownership to God.

10. Per Blackburn, J., in Fletcher versus Rylands (1866) L.R.I. Ex. 265, 279.

11. Russell, C J., in Prince versus South Metropolitan Gas Company (1895) 65L, J.Q.B. 126.

12. *The Law of Torts* (London, 5th Ed.), p. 456.

Article 92 of the Majallah *and Rylands vs. Fletcher.* The case of Rylands versus Fletcher lays down that where the owner of land, without wilfulness or negligence, uses his land in ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable for any mischief thereby occasioned.

The principle of Rylands versus Fletcher is :

"That the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."[10]

The principle of Rylands versus Fletcher has been called "the wild beast theory".[11] Unless there is an escape of the substance from the occupier's land, there is no liability under the rules.

Article 92 of the *Majallah* says that "a person who does an act, even if he does not act intentionally, is responsible" :

مرتکب ذمہ دار ہے چاہے وہ عمداً نہ کرے (مجلہ) -

Article 92 of the *Majallah* and the principle enunciated in Rylands vs. Fletcher are identical. In other words, the owner of a thing has only a general right of the use thereof. His right is not absolute or unlimited. He is perfectly justified in doing anything on his property so long as his act does not affect the property of another injuriously. In case he does anything, though, innocently, by which the property of another, even though that another may not be his immediate neighbour, is damaged, he is responsible for the damage so caused. Thus tort is the doctrine of strict liability which is determined irrespective of the existence or non-existence of intention or the knowledge of the person liable. Sir Frederick Pollock says :

"The law takes notice that certain things are a source of extraordinary risks, and a man who exposes his neighbour to such risk is held, although his act is not of itself wrongful, to insure his neighbour against any consequent harm not due to some cause beyond human foresight and control."[12]

Verbal Dispositions (التصرفات القولیہ). Verbal dispositions are of two types : (1) unilateral, e.g. *waqf* and bequest, etc.; (2) bilateral, e.g. contracts.

Waqf (وقف). The literal meaning of *waqf* is detention. The legal meaning of *waqf*, according to Imam Abu Hanifah, is the detention of a specific thing in the ownership of the *waqif*, and the devoting of its profits in charity to the poor or other good objects. A *waqf* extinguishes the right of the *waqif* and transfers ownership to God.

10. Per Blackburn, J., in Fletcher versus Rylands (1866) L.R.I. Ex. 265, 279.

11. Russell, C J., in Prince versus South Metropolitan Gas Company (1895) 65L, J.Q.B. 126.

12. *The Law of Torts* (London, 5th Ed.), p. 456.

In Shi'ah *fiqh* the definition of *waqf* is as follows :

"وقف وہ عقد ہے جس کا ثمرہ تحبیس اصل اور اطلاق منفعت ہے ۔"[13]

Difference. The Shi'ah *fiqh* differs from the Hanafi fiqh :

"جمہور حنفی فقہا کے نزدیک جائداد موقوفہ خدا کی ملکیت ہو جاتا ہے لیکن شیعی فقہا کے نزدیک وقف واقف کے ورثا کی طرف رجوع کرے گا ۔"[14]

Mr F. B. Tyabji says :

"The completion of a wakf is, of course, distinct from the acting upon a wakf after it has been completed. But the acting upon a declaration of *wakf* may be evidence to show (1) that it has been completed, (2) that there was the intention that the declaration should take place."[15]

Waqf *as Defined in the Waqf Act*. "Waqf means the permanent declaration by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable."

The following points are important to note with respect to *waqf* :

(1) Declaration must be permanent.

(2) The subject of *waqf* may be any property.

(3) The subject of *waqf* must belong to *waqif*.

(4) The objects of a *waqf* must be indicated with reasonable certainty, otherwise the *waqf* will be void for uncertainty.

13. "شرائع اسلام" (Tehran), p. 152.

14. Ibid., p 154.

15. *A Handbook on Muhammadan Law*, p. 155.

(5) A *waqf* may be *inter vivos* or testamentary.

(6) A *waqf* made by will or during *mard al-maut* cannot operate upon more than one-third of the net assets without the consent of the heirs.

(7) *Waqf* property cannot be alienated.

Waqf 'alal-Aulad. It is also called a private *waqf*. It is for the benefit of the settler's family and his descendants. Dr Tanzil ur-Rahman says :

وقف علی الاولاد اصل خاندان کے لیے جائداد وقف کرنے کے متعلق ہے ۔ یوں تو شرعاً ہر قسم کا وقف کرنا کار ثواب ہے لیکن اولاد ، اصل خاندان اور اقربا کے لیے وقف کرنا دیگر اوقاف سے افضل اور زیادہ موجب ثواب ہے ، کیونکہ ہر مسلمان کا فرض ہے کہ پہلے ان لوگوں کی پرورش کا کفیل ہو جن کی پرورش اس کے ذمہ ہے" ۔[16]

Bequest (وصیت). A bequest or will means an endowment with the property of anything after death as if one person should say to another : "Give this article of mine, after my death, to a particular person." The thing so given is termed as legacy (موصی بہ); the person who wills is testator (موصی); the person in whose favour the will is made is called the legatee (موصی لہ); and the person appointed to carry the will into execution is called the executor (وصی).

Important Points. (1) A person may make his will either orally or in writing and no formalities are required.[17]

(2) Every Muslim of sound mind and not a minor may dispose of his property by will.

16. "قوانین اسلام," III, 1099.

17. 28 All, 715, 718.

(3) Bequest to heir is not valid unless the other heirs consent to the bequest after the death of the testator.

(4) A Muslim cannot by will dispose of more than a third of the surplus of his estate after payment of his funeral expenses and debts. Bequest in excess of one-third can take place only with the consent of the heirs after the death of the testator.

(5) If the testator has no heir, he may bequeath the whole of his property to a stranger.[18]

(6) It is sufficient that the subject of legacy exists at the time of testator's death.

(7) The subject of bequest may be any property capable of being transferred.

(8) A *bequest futuro* is void.

(9) A contingent bequest is void.

(10) An alternative bequest is void.

(11) A bequest may be revoked either expressly or by implication.

Contract

"The most important and frequent mode of acquisition of ownership is transfer by an act of the person having the ownership to another person. Such transfer is effected by means of a contract (عقد)."[19] In law it means conjunction of the elements of disposition, namely, proposal (ایجاب) and acceptance (قبول).

Formation of Contract. According to Islamic law,

18. Baillie, 625.
19 Sir Abdur Rahim, op. cit., p. 282.

the formation of contracts does not require any formality. Basically the offer and acceptance are the essentials in this respect. The proposal and acceptance must be made at the same meeting (مجلس) either in fact or what the law considers as such.

Impediments to Consent. The following are the impediments to consent :

(1) *Coercion or Duress.* An act done under duress is intentional but not consented to. "Among Mohammadans marriage is a contract, and, as is the case with other contracts, freedom of consent in the contracting parties is one of the essential conditions of its validity. Where each of the contracting parties is *sui juris*, but the so-called consent is constrained or involuntary, the party so constrained will not be held bound by the resulting contract."[20]

(2) *Undue Influence.* The basis of a contract is consent, and, therefore, the courts will regard as undue any influence brought to bear on a person entering into a contract which, having regard to the age and capacity of the party and the character and circumstances of the case, appears to preclude the exercise of free and deliberate judgment."[21]

(3) *Fraud.*

(4) *Misrepresentation.*

(5) *Mistake.*

Mr T. R. Desai says :

"That coercion, undue influence, fraud and misrepresen-

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tation are all separate and severable categories though in a particular case some of them may overlap or may be combined."[22]

Object of Contract. The term "object" means purpose or design. There may be nothing objectionable so far as the consideration for an agreement is concerned and yet the purpose for which it was entered into may be unlawful and the agreement would be void. "A contract is illegal if it be in contravention of a statute or opposed to its general policy and intent or is forbidden by law or legislative enactments."[23]

Types of Special Contracts. Sale (بیع). Sale signifies an exchange of property for property with the mutual consent of the parties.[24] There are four kinds of sale:

(1) When a determinate article is sold for price, for example, sale of a house, it is called *bai'* (بیع).

(2) When a determinate article is sold for another determinate article, it is called barter (مقائضہ).

(3) Sale of price for price or money-changing is called *surf* (صرف), for instance, when gold is sold for silver, there must be mutual delivery and both of them must be exact in weight.

(4) Sale in which the person was paid in advance and the article to be delivered on a future date is called *salam* (سلم).

Hire (اجارہ). *Ijarah* is defined as the sale of ascertained usufruct in exchange for some ascertained

22. *Contract Act*, p. 83.
23. Ibid., p. 115.
24. *Hidayah*, p. 241.

thing.[25] It includes leases, contracts of bailment and for personal and professional services. Usufruct is said to be ascertained when the period of use and enjoyment of the thing by the hirer is fixed.[26]

"اجارہ ایک عقد (معاملہ) ہے جو کسی عوض کے بدلہ منافع کا ہو، اور یہ اس وقت تک صحیح نہ ہوگا جب تک منافع اور اجرت معلوم نہ ہو - جو چیز بیع میں ثمن بننے کی صلاحیت رکھتی ہے وہی اجارہ میں اجرت بن سکتی ہے -"[27]

In the language of law, it signifies a contract of usufruct for a return. The contract in question is, however, valid because mankind stands in need of such contract; and also because the Prophet has said: "Pay the hireling his wages before the sweat has dried from his brow," and also, "If a person hires another, let him inform him of the wages he is to receive."[28]

The hire can be claimed only in virtue of an agreement, or in consequence of the end of the contract being obtained; for example, a workman is not entitled to anything until his work is finished. He may retain the property until payment.

Proposal and acceptance are the two important ingredients in the contract of *ijarah*.

If the property is damaged in the hands of the lessee, he is not liable if the damage is without his fault.

Loan (عاریت). Loan or *'ariyat* signifies an investiture with the use of a thing without a return.[29] In

25. *Majallah*, S. 405.
26. Ibid., S. 408.
27. "قدوری," p. 120.
28. *Hidayah*, p. 489.
29. Ibid., p. 478.

other words, it may be defined as giving of a thing by one person to another person without receiving anything in return. The intention is that the other person should use the usufruct. Sh. Abul Husain Ahmad writes :

"عاریت کا حکم بھی امانت کا سا ہے (یعنی مستعیر کے پاس بطور امانت سمجھی جائے گی) بغیر زیادتی کیے - اگر وہ ضائع ہو جائے تو مستعیر ضامن نہ ہو گا -"[30]

['*Ariyat* is like a trust. The borrower is not responsible for the loss of it, unless he transgresses respecting it.]

"مستعیر کو چاہیے کہ اس مانگی ہوئی چیز کو کرایہ پر نہ چڑھائے - اگر اس نے ایسا کیا اور وہ چیز تلف ہو گئی تو یہ ذمہ دار ہو گا - ہاں اگر وہ چیز ایسی ہے کہ استعمال سے اس میں کوئی فرق نہیں پڑتا تو بطور عاریت دے سکتا ہے -"[31]

[The borrower cannot let it out on hire. If he let it, he becomes responsible for its loss. On the other hand, he may lend it to another person, provided it be of such a nature that it may not be affected by different uses.]

Deposit (ودیعت). The property left with another person for the purpose of keeping it is styled as deposit. It is a trust in the hands of the depositee. A trustee is not responsible for a deposit unless he transgresses with respect to it. He may keep it with him or entrust its care to his family. In case he gives charge of it to a stranger, or keeps it in a place belonging to other, he is responsible. If he mixes it inseparably with his own property, he must compensate the proprietor. If the trustee neglects or refuses to deliver

30. "قدوری," p. 165. 31. Ibid.

the deposit on demand by the proprietor, he becomes responsible.

The contract of deposit may be terminated at an option of either party.

Guarantee (کفالة). A contract of guarantee signifies the responsibility or liability of a person to that of another person in respect of a demand for something. Imam 'Abdullah b. Ahmad b. Mahmud Nasafi says :

"دوسرے کے ذمہ کے ساتھ اپنا ذمہ ملانا مطالبہ میں ضمانت کہلاتا ہے یعنی جو مواخذہ اور تقاضا دوسرے کے ذمے ہے اس کو اپنے اوپر لے لینا کفالت اور ضامنی ہے -"[32]

Guarantee is of two kinds :

(1) Bail for the person (ذاتی کفالت یا حاضر ضامنی).

(2) Bail for the property (مال کی کفالت یا مال ضامنی).

The contract of guarantee may be for the production of a person, the discharge of a pecuniary obligation or debt, the delivery of property and the like.[33] Regarding the bail for the person, Sh. Abul Husain Ahmad says :

"کفالت نفس یعنی حاضر ضامنی جائز ہے - جب مکفول مطالبہ کرے تو کفیل کو لازم ہے کہ جس کی ضمانت دی ہے اس کو حاضر کرے"-[34]

Pledge (رھن). Pledging or pawning is a legal term which signifies the detention of a thing on account of claim which may be answered by means of that thing, as in the case of debt. This practice of pledg-

32. "احسن المسائل" ترجمہ "کنز الدقائق," p. 222.
33. *Majallah.* 34. "قدوری," p. 145.

ing is lawful in Islam. It is related that the Prophet, in a bargain with a Jew for grain, gave his coat-of-mail in pledge for the payment. Moreover, the Holy Qur'an says :

و ان كنتم على سفر و لم تجدوا كاتبً فرهان مقبوضة (2 : 283) -

[If ye be on a journey and cannot find a scribe, then a pledge in hand (shall suffice).]

"رهن ایجاب و قبول سے منعقد ہو جاتا ہے اور قبضہ کے بعد اس کی تکمیل ہو جاتی ہے"۔[35]

[The contract of pledge is established by declaration and acceptance. It is confirmed by the receipt of pledge.]

When a pledgee takes possession of the pledge, the contract is binding and he is responsible for it. According to Hanafis, a pledge is a trust (امانت) in the hands of the pledgee.

Both movable and immovable properties can be the subject of a pledge, but, according to Hanafis, differing from Shafi'is and Malikis, an undivided share in immovable property cannot be pledged.[36]

A pledge is constituted by a contract, which is not completed according to the Hanafis until possession has been given of the property to the pledgee. That is to say, a promise by a debtor to pledge his property for the satisfaction of a debt cannot be enforced. The Malikis, however, take a different view holding that such a contract is as binding as contract to sell.[37]

35. Ibid., p. 108.
36. *Hidayah*. IX, 82-86.
37. Ibid., IX, 66.

The pledgee can retain the possession of the pledge until the debt is satisfied. In case of default committed by the pawner in performance of his promise at the stipulated time, the pawnee can either: (1) bring a suit against the pawner upon the debt, and retain the goods as collateral security, or (2) sell the thing pledged on giving the pawner reasonable notice of the sale. If there is a surplus on the sale, it shall go to the pawner and if there is a deficiency the pawner will remain liable for the balance.

Agency (وکالت). Agency consists in the delegating by a person of his business to another and in substituting him in his place. The latter is called the *vakil* or "agent" and the former is called *muwakkil* (موکل) or principal, the business which is entrusted is called (موکل بہ).[38] It is constituted by "proposal" and "acceptance".[39] 'Allamah Nasafi says :

"دوسرے کو اپنی ذات کے قائم مقام کر دینا ایسے تصرف میں جس کا خود موکل کو اختیار ہے"۔[40]

The agent must be competent to perform the act delegated to him. An agent must be major and of sound mind. He must be properly instructed with respect to what he is to perform.

Agency is permissible in all matters of business except in torts crimes. The acts done by the agent, if within his authority, are binding on the principal. If any act is done by the agent on behalf of a prin-

38. *Majallah*, S. 1449.
39. Ibid., S. 1451.
40. "كنز الدقائق", p. 244.

cipal without his express or implied authority, he is personally liable.

The agency may be terminated in the following cases :

(1) *By agreement*. It may be either by the principal revoking his authority or the agent renouncing the business of the agency or by the business of the agency being accomplished.

(2) *By the death of the principal or agent*.

(3) *By change of status* : (*a*) by insolvency of the principal, (*b*) insanity of the principal or agent.

Even after discharge, an agent retains his authority to bind the principal by his acts so far as third parties are concerned, until the fact of such discharge is notified.[41]

Arbitration (تحکیم). Section 1531 of the *Majallah* has :

"تحکیم وہ معاملہ ہے جو نزاع کو باہمی رضامندی سے ختم کر دے۔"[42]

Under the Islamic law the disputants are allowed to refer their dispute with respect to property and other similar private rights to arbitration.

The arbitrator exercises the same functions as of a *qadi*. There can be no arbitration in cases of *hadd* and retaliation. On the filing of an award in a court by the arbitrator a decree be passed accordingly.

Partnership (شرکت). Two or more persons may combine to carry on business on condition that the capital and the profits will be shared among them. Such a combination is called "Partnership in Contract" (شرکت العقد) as distinguished from "Partnership in Property" (شرکت الملک).

41. Ibid., S. 1523.

An agreement to share the profits is an essential element in the contract of partnership. Moreover, shares of the partners should be specified. The powers and liabilities of the partners are as follows :

(1) Each is regarded as agent of the other.

(2) No partner can lend partnership property except with the permission of the other, but he may borrow without such permission on partnership account.

(3) The partnership property is regarded as a trust in the hands of the partners.

(4) The sharing of losses depends on agreement. In case of an unequal partnership the loss will be sustained by each partner in proportion to his capital unless otherwise provided.

The dissolution of partnership may take place :

(1) by giving notice by one partner to another.

(2) by the operation of law.

(3) It also gets dissolved by the death of a partner or his becoming a lunatic. The partnership in the latter case may continue between the rest of the partners.

The Concept of Juristic Person (الشخصیۃ المعنویہ)

Persons are of two kinds : (1) natural and (2) legal. In the eye of law, sometimes even a natural person is not considered to be a person possessed of legal rights and liabilities, for instance, a slave is

destitute of legal rights and liabilities. So a person, whether real or imaginary, is the one who is possessed of legal rights and liabilities. At times, a person who is not a human being is treated to be a person by law. This fictitious personality is conferred on such persons in order to solve many complex problems that normally arise in the determination of rights and liabilities. A joint-stock company is a juristic person no less than a real human being. Similarly, a municipal corporation is treated as a juristic person even though in reality it is not a person. So there are two types of juristic persons, corporation sole and corporation aggregate. A corporation sole comprises a series of successive persons occupying the office in succession. The corporation aggregate, on the other hand, consists of a group of persons who are sometimes said to be members or the share-holders of such corporations. Examples of corporation sole are: Post-Master General. Attorney-General, Solicitor-General, President and so on. Corporation aggregate are joint-stock companies (comprising many share-holders), municipal corporation consisting of the members representing the city, insurance companies, etc. Similarly, a university or any other corporate body is also a person in the eye of the law no less than a real human being is. The law has devised a device by introducing a fiction whereby an imaginary person is considered to be a real person in the eye of the law and such person is said to be a juristic person.

Islamic law recognises the concept of juristic person. The State Treasury (بیت المال) and *Waqf* (وقف) may be quoted as examples.

Negotiable Instrument (حوالہ)

A right in personam cannot be transferred because in the first case it has its origin in the express consent of the person of incidence and in the second case by implication of law. It can be dealt with by the promisor's consent. Such a transfer is called محوالہ. According to the *Majallah*, it may be as :

"حوالہ ایک شخص کے ذمہ سے دین کو دوسرے شخص کے ذمہ منتقل کرنے کو کہتے ہیں ۔"[42]

Under the Negotiable Instrument Act (XXVI of 1881), a "Negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer" (S. 13).

Sh. Abul Husain Ahmad says:

"قرضوں میں حوالہ جائز ہے ۔ حوالہ قرض دار ، قرض خواہ اور جس پر حوالہ کیا جائے ان تینوں کی مرضی سے صحیح ہو جاتا ہے ۔ جب حوالہ کی کارروائی قاعدہ کے مطابق مکمل ہو جائے تو قرض دار قرض سے بالکل بری ہو جاتا ہے ، قرض خواہ کو اس سے مانگنے کا حق نہیں ۔ ہاں اگر اس کا حق باطل ہو جائے تو تقاضا بھی کر سکتا ہے ۔ اور امام اعظم کے نزدیک حوالہ کے بعد ان دو صورتوں میں قرض خواہ کا قرض دار سے مانگنے کا حق لوٹ آتا ہے ۔ پہلی صورت تو یہ ہے کہ جس نے اپنے اوپر قرض لیا تھا وہ اس سے مکر جائے اور قسم کھا لے اور قرض دار و قرض خواہ کے پاس گواہ نہ ہوں ۔ دوسری صورت یہ ہے کہ وہ ذمہ دار مفلسی

42. Ibid., S. 673.

کی حالت میں مر جائے اور صاحبین فرماتے ہیں کہ ان دو وجوہ کے علاوہ ایک تیسری وجہ یہ بھی ہے کہ اس ذمہ دار کو زندگی ہی میں حکومت دیوالیہ قرار دے دے"۔[43]

Evidence

Proof is of vital importance in the process of administration of justice. The Holy Prophet says :

لو یعطی الناس بدعواهم لا دعی ناس دماء رجال واموالهم ۔[44]

[If people were given what they asked when they brought a case, some would claim the lives and property of others.]

It is a check against instituting a false and vexacious suit. "In every system of jurisprudence it is recognised that, before a fact is accepted and acted upon, it must be proved. Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of enquiry."[45]

The expression "Burden of Proof" means the burden of establishing a case, and the duty or necessity of introducing evidence. The general rule is that he who asserts must prove. It is a common practice that the burden of proof lies on the party that substantially asserts the affirmation of the issue and not upon the party who denies it. The *hadith* of the Holy Prophet goes :

43. "قدوری," pp. 148-49.
44. *Mishkat al-Masabih*, p. 326.
45. Earl of Halebury, *The Laws of England*, XIII, 410.

البینة علی المدعی والیمین علی من انکر ۔

[The plaintiff must produce witnesses and oath is for the defendant.]

It is elucidated as :

و کذلک قول النبی صلی الله علیه وسلم البینة علی المدعی المراد به ان علیه مایصحح دعواه لیحکم له والشاهدان من البینة ۔

[Likewise the saying of the Prophet that the plaintiff should produce evidence means such evidence which proves his claim so that he may be given relief. Witnesses are also included in *bayyanah*.]

Three Modes of Proving a Case. There are three modes of proving a case : (1) admission ; (2) oath ; and (3) evidence.

Admission. The corresponding Arabic word for admission is *iqrar* (اقرار). It is a well-known principle of Evidence that the admitted fact need not be proved. The admission of a defendant is of vital importance in the decision of the case. Mr Sobhi Mahmassani says :

"دلائل شرعیہ میں اثبات دعویٰ کے لیے سب سے زیادہ قوی دلیل مدعا علیہ کا اقرار ہے ، یعنی یہ کہ مدعا علیہ اس بات کو تسلیم کر لے جس کا دعوی کیا گیا ہے ، یا بالفاظ دیگر اپنے خلاف گواہی دے"۔[46]

With the admission the affirmer acknowledges the contents of the suit against him. "The admission is evidence against the party making it, but not in his favour."[47] The principle of admission is based on the following Qur'anic verse :

46. "فلسفۂ شریعت اسلام," p. 374.
47. Suyuti, *Jami' al-Saghir*, No. 5004.

يا ايها الذين آمنوا كونوا قوامين بالقسط شهدآء لله ولو علىٰ انفسكم - (135 : 4)

[O ye who believe ! be ye staunch in justice, witnesses for Allah even though it be against yourselves.]

A *hadith* of the Holy Prophet may be quoted as under :

قل الحق ولو علىٰ انفسک ـ

[Speak the truth even if it is against you.]

Admissions in references to crimes are called confessions. According to Mr Taylor, "admission and confessions are often considered as declaration against interest and therefore probably true."[48]

Admission is a wider term than confession. Mr S. C. Sarkar says : "The term admission is usually applied to civil transactions and to those matters of fact in criminal cases which do not involve criminal intent while the term confession is generally used in criminal law, as denoting an acknowledgment of guilt."[49]

Oath (اليمين). Syed 'Abdullah Ali Husain defines oath as : "Oath means an affirmation in the name of Allah, the Great, on the greater right of a deponent over a disputed thing or an affirmation on the absence of a greater right of a plaintiff which he claims over the deponent."[50] Evidence is an information which is authenticated with an oath. During the pre-Islamic period an oath was also administered. "Much

49. *The Law of Evidence.*
49. *The Law of Evidence* (1946, 7th Ed.), p. 124.
50. "المقازمات التشريعية," Pt. III, p. 29.

solemnity was attached to the ceremony of administering it and a place called *Hatim* (حطيم) was set apart just outside the Ka'bah for this purpose. The exact form of the oath is not known, but it appears that the pre-Islamic Arabs used to swear by Hubal, their chief deity, or by their ancestors, and at the end of the ceremony would throw down a whip or sandals or a bow as a token that they had taken a binding oath."[51]

Under the Islamic Law of Evidence, oath is always taken in the name of Allah. The Holy Prophet says :

فقال رسول الله صلى الله عليه وسلم ان الله ينهاكم ان تحلفوا بابائكم بلم فمن كان حالفاً فليحلف بالله آوليصمت ـ[52]

[The Messenger of God said: "God forbids you to swear by your fathers. If anyone swears he must swear by Allah, or keep silent.]

Oath is considered as a guarantee of truth and authenticity. A special sanctity is attached to it. If its sanctity is preached among the contestants and witnesses it may be safely said that it may help in the speedy disposal of cases.

Evidence (البينة). *Bayyanah* is derived from *bayan* which signifies expression. Everything which leads to the truth is included in *bayyanah*.' The term *bayyanah* is mostly used for *Shahadah*. In other words, *bayyanah* is a name given to all those things which

51. Abdur Rahim, op. cit.
52. Imam Malik, *Muwatta'*, p. 418.

explain and clarify a right. The Prophet called the witnesses as *bayyanah*, because of the clarity of their statement and removal of doubts by their clarification with evidence.[53] It may be analysed thus: "*Shahadah* means giving an information of a person's right in favour of another against the third. It has three kinds: (1) giving an information of one's right over another, it is called *Shahadah*; or (2) of one's own right over another, this is a suit; or, (3) of another's right against oneself, this is an admission.[54] According to Mr Taylor, "the word evidence, considered in relation to law, includes all the legal means exclusive of mere argument, the truth of which is submitted to judicial investigation."[55]

Islamic Law of Evidence is based on the Qur'an and *Sunnah*. It is in consonance with reason and human nature. The Qur'an lays stress on giving evidence with steadfastness on God. A witness must be just and reliable. In fact, the witnesses are the judges of the cause. When they are summoned by the plaintiff, it is obligatory to them because Allah says:

و لایاب الشهداء اذا ما دعوا (2 : 282) -

[And the witnesses must not refuse when they are summoned.]

Truthfulness is a cardinal principle of evidence. God says:

یا ایها الذین آمنوا کونوا قوامین لله شهداء بالقسط ولا یجرمنکم شنآن قوم علی الا تعدلوا اعدلوا هو اقرب للتقوی واتقوا الله ؕ ان الله خبیر بما

53. "معین الحکام," p. 78.

54. "شرح وقایه مع حاشیه," p. 243. 55. Op. cit., I, 1.

تعلمون (5 : 7) -

[O ye who believe! be steadfast witnesses for Allah in equity, and let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to duty. And fear Allah. Lo! Allah is informed of what ye do.]

The *'adala* (justness) of a witness is essential. Islam is vehemently against the liars. "False evidence is an intentional falsehood against another."[56] A witness should not conceal his evidence. The Qur'an says:

ولا تکتموا الشهادة و من یکتمها فانه آثم قلبه (2 : 283) -

[Hide not testimony. He who hideth it, verily his heart is sinful.]

Evidence is of three kinds: oral, documentary and circumstantial. Technically speaking, it may be divided into two broad heads, viz. direct and indirect. The law with respect to retraction of witnesses and of plaintiff is also available in the Islamic Law of Evidence. The parties to the suit are also allowed to cross-examine the witnesses of each other. Court questions may be asked. Private investigations and the scrutiny of evidence by a *qadi* play an important role in the Islamic judicial system. As false evidence is a major sin, so the perjurers are punished under Islamic law. The Islamic Law of Evidence is a God-made law, so it is perfect, final and is good for all times to come.

The Qur'an says:

یا ایها الذین آمنوا ان جاءکم فاسق بنبا فتبینوا (49 : 6) -

56. *Tafsir Ibn Kathir*, III, 329.

[O ye who believe ! If an evil-liver bring you tiding, verify it.]

The salient features of Islamic Law of Evidence may be briefly enumerated as under :

(1) Testimony is kept upright for God.

واقيموا الشهادة لله (65 : 2) -

(2) A witness is just. Justness (*'adala*) is a condition precedent for evidence. The Qur'an says :

والشهدوا ذوى عدل منكم (65 : 2) -

[And call to witness two just men among you.]

والذين هم بشهداتهم قائمون (70 : 33) -

[And those who stand by their testimony.]

(3) Primary evidence is the oral evidence. Documentation is the secondary evidence.

(4) As a rule, two males or one male and two females are the maximum requirement except in case of whoredom and slander in which four witnesses are required. In other words, the evidence of one man is equal to the evidence of two women.

(5) A woman is not competent witness in cases of *hudud*.

(6) The testimony should be certain and not based on conjectures.

(7) The cardinal principle of Islamic Law of Evidence is :

البنية على المدعى و اليمين على من انكر -[57]

[Plaintiff must produce witnesses and oath is for the defendant].

57. *Mishkat al-Masabih*, p. 326.

(8) The Islamic Law of Evidence is fundamentally based on moral values. The Qur'an says :

ولا يضار كاتب ولا شهيد (282 : 2) -

[And let no harm be done to scribe and witness.]

The Prophet says :

اكرموا الشهود فان الله تعالى يحيى بهم الحقوق -[58]

[Respect the witnesses because God enlivens the right (of the people) through them.]

THE END

58. Sarakhsi, "المبسوط," XVI, 87.

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